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IN THE

Supreme Court of the United States

No. Term,

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petitioners, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, respectfully petition this Honorable Court for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and respectfully show:

Summary Statement of Matters Involved.

This is a suit in equity brought in the United States District Court for the Eastern District of Pennsylvania by Federal Deposit Insurance Corporation, a corporation, Respondent herein, against Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the estate of Alfred A. DuBan, deceased (petitioners herein); and National Dairy Products Corporation, to secure a deficiency judg-

ment against Alker upon a promissory note and to compel the National Dairy Products Corporation to transfer to Federal Deposit Insurance Corporation as owner 4400 shares of National Dairy Products Corporation stock claimed by Mamie DuBan as Executrix of Estate of Alfred A. DuBan, deceased, and to pay Federal Deposit Insurance Corporation all dividends on said stock since November 20, 1942. The United States District Court decided in favor of the plaintiff, entered judgment against Alker for a deficiency of $117,581.35 with costs, and directed National Dairy Products Corporation to make the said transfer and pay over the said dividends. An appeal was taken from the judgment by Alker and Mamie DuBan, individually, and as Executrix, to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the judgment of the United States District Court.

The facts relating to the note and collateral are these:

In 1929 Alker, a lawyer, one of the petitioners, borrowed about $600,000. from the Integrity Trust Company, giving his note therefor, and as security various collateral. Later the bank split the loan and had Alker execute on May 26, 1931, two demand notes in favor of the bank, one for $350,000. and one for $242,150., the securities remaining as collateral for the two notes. In September, 1931, the bank demanded additional collateral. Alker was not able at the time to deposit more collateral, but a friend Alfred A. DuBan agreed to put up 1,000 shares of National Dairy Products Corporation stock provided the bank and Alker would work out some arrangement whereby there would be no more demands for additional collateral, and the entire collateral would not be disturbed until financial conditions improved so that all parties would get out without any loss. It was finally orally agreed between the Integrity Trust Company, acting by its Executive Officers, on the one hand, and DuBan and Alker, on the other, that the bank would make no demands for additional collateral and the loan would not be disturbed, but would remain in status

quo, until the equities of all persons had been worked out, provided DuBan put up the 1,000 shares of stock—then worth a considerable amount—and provided also that Alker assign a number of very substantial legal fees, earned but not yet paid, would secure and maintain $100,000. additional life insurance on his life in favor of the bank, (it already holding a $25,000. policy on Alker's life), and continue to pay the premiums on the insurance and the interest on the loan. The stock was put up, the extra insurance taken out, and the fees assigned. All the premiums on the insurance have been paid by Alker and he has also regularly paid or tendered the interest on the loan to date. One of the active directors and members of the Executive Committee of the bank testified to the agreement and that the same came before the Executive Committee and the Board and was approved. He also testified it came a number of times later before the Executive Committee, or the Board, and in each instance the agreement was re-affirmed.

In 1936 a Bank Examiner advised the bank it should secure a new note as the original notes were more than five years old. Alker, at the request of the bank, executed a new note in favor of the bank on December 11, 1936, for $564,367.31, (the face of the notes having been reduced to that amount), the new note reciting specifically it was in substitution for and continuance of the pre-existing notes as to which the agreement had been made. There was no concealment or attempt at concealment. The transaction was as much for the benefit of the bank as for the benefit of Alker.

In 1936, the insurance policies were renewed for a ten year period, the details therefor having been arranged by the trust company. The new policies arranged for by the trust company expire at the end of 1946.

In January, 1940, the bank ceased to do business. Its assets, including the Alker note, the insurance policies, assignment of the unpaid fees along with all the other collateral held by the bank were all assigned to the Respond-

ent, which had insured the deposits of the Bank. Alker thereafter paid the interest on the loan to Respondent as assignee at the rate of 5%, amounting to over $25,000.00 a year. The Respondent accepted and retained the same, regularly giving its receipts therefor. Alker has continued to pay the insurance premiums amounting to over $5,000.00 a year for the benefit of the Federal Deposit Insurance Corporation, assignee, and the insurance is still in force.

Respondent shortly thereafter in reviewing the assets of the bank, checked up on the agreement, interviewing Alker and Mr. Fisher, a director of the bank who was familiar with the transaction.

Late in 1942, while Alker was seriously ill in a hospital, the Respondent sought to transfer the DuBan National Dairy stock pledged as collateral to its own name. Alker protested that such was contrary to the oral agreement. Then on November 21, 1942, the Respondent for the first time demanded that the note dated December 11, 1936 be paid in full. Alker again protested, claiming, there being no default in the agreement, that any such demand at that time was contrary to the agreement, but Respondent insisted. The note was not paid. The Respondent thereupon went through the form of a private sale to itself on January 23, 1943, of a large part of the collateral for the sum of $358,336.50, on the second floor rear of the Respondent's premises with only two of its own clerks present.

Many of the various securities the Federal Deposit Insurance Corporation sold to itself for a nominal value of $1. per lot. Today these securities are considerably higher in value, and the prices of all the collateral have risen to such an extent that, if the Federal Deposit Insurance Corporation had abided by the oral agreement, the note could have been paid off in full, and all the equity in the collateral could have been returned to each of the parties concerned. Alker and DuBan denied the validity of the alleged sale and demanded that the Respondent perform the agreement,

in which there was no default, and National Dairy refused to transfer the DuBan stock.

The Respondent thereupon instituted this action in equity. By this time Alker had paid back to the Trust Company and the Respondent well over $400,000.00.

The Respondent in its pleadings did not allege anything illegal, fraudulent, improper or secretive in connection with this transaction or any phase thereof. The District Court found that there was no fraud involved in the transaction, but decided for the Respondent.

On appeal the Circuit Court of Appeals affirmed the judgment of the District Court.

The principal questions involved on said appeal were:

I. Did the Chancellor err in his interpretation of the law of contracts as to when agreements are unenforceable because of a lack of definiteness and certainty?

II. Did the Chancellor err in ruling that the agreement was unenforceable because of lack of proof?

III. Did the Trial Court err in holding that the principal issue raised by the evidence was one of fact?

IV. Did the Chancellor err in failing to make separate findings of fact and separate conclusions of law?

These questions were not decided by said Circuit Court of Appeals, the said Circuit Court of Appeals erroneously affirming the judgment of the District Court for the following reasons:

(1) The Court held the contract to be a secret agreement within the ruling of the D'Oench Duhme & Co. case;

(2) The Court held the contract unenforceable against Federal Deposit Insurance Corporation because of the provisions of 12 U. S. C. A. 264 (s).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. A. 347 (a).

Judgment was entered in this case by the Circuit Court of Appeals on November 7, 1945 and a petition for rehearing was denied on December 12, 1945.

Questions Presented.

1. Is an oral agreement fixing the maturity of a demand collateral note, for valuable consideration, a "secret" "agreement," within the meaning of the decision of this Court In *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447, so that it may not be enforced against the Federal Deposit Insurance Corporation which took the demand note more than three years after its date and failed to demand its payment until almost six years after its date?

2. Is this case controlled by the decision of this Court in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447?

3. Do the provisions of Section 12B (s) of the Federal Reserve Act, 12 U. S. C. A. Sec. 264 (s) have any application to this case?

4. Did not the Circuit Court of Appeals for the Third Circuit err in affirming the judgment in favor of F. D. I. C. on the theory of a "secret agreement" when the F. D. I. C. did not allege in its pleadings any such "secret agreement," fraud, deception or attempt to mislead anyone, nor was there any evidence offered by the F. D. I. C. to that effect?

5. Did not the Circuit Court of Appeals for the Third Circuit err in finding there was a "secret" agreement and fraud in the face of an expressed finding by the District Court that there was no fraud and no secret agreement?

6. Was the sale conducted in the second story back room of the respondent's office by one of its employees to another of securities whose real value was very large, a valid sale?

7. Did not the United States Circuit Court of Appeals for the Third Circuit err in affirming the trial court's decision which decided an important question of fundamental law in disregard of the applicable provisions of the Pennsylvania Negotiable Instruments Law and contrary to the established decisions of the courts of Pennsylvania which have been followed by this circuit and district.

8. Did not the Circuit Court of Appeals for the Third Circuit err in affirming the decision of the District Court in disregard of the error of the District Court in holding the contract unenforceable because of indefiniteness?

9. Did not the Circuit Court of Appeals for the Third Circuit err in failing to consider the errors committed by the District Court in ruling the agreement unenforceable because of lack of proof and in refusing to admit certain affidavits?

10. In the interest of brevity (Rule 38, par. 2; and *Furness, Withy & Co., Ltd. v. Yang Tsze Insurance Association, Ltd., et. al.*, 242 U. S. 409), petitioners do not at this time set forth all of the questions which will be argued in the argument on the merits of this cause should the certiorari be granted, nor all the contentions in support of such questions, but in order to comply with the rule of this court requiring that all issues upon which decision is requested be presented in the petition for certiorari (*Grening v. Cooley*, 281 U. S. 90, 98) petitioners here refer to and incorporate into this petition all of the matters presented

in its statement of questions involved relied upon in the appeal to the United States Circuit Court of Appeals for the Third Circuit with the same force and effect as if herein set out in full.

Reasons Relied Upon For Allowance of Writ.

1. The United States Circuit Court of Appeals for the Third Circuit has misconstrued and wrongfully applied the decision of this court in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447, extending it to a situation in no way within the scope of that decision, the facts being entirely different.

D'Oench, Duhme & Co., v. F. D. I. C., 315 U. S. 447.

2. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of fundamental law in conflict with a decision of the United States Supreme Court.

Deitrick v. Standard Surety Company, 303 U. S. 471.

3. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of fundamental law on a theory which was not alleged or set forth in any of the pleadings, and as to which the Respondent offered no evidence.

THEORY OF "SECRET AGREEMENT."

4. The United States Circuit Court of Appeals for the Third Circuit has, in relying upon Section 12B (s) of the Federal Reserve Act, Section 12 U. S. C. A. Section 264 (s) in support of its conclusion, misconstrued an important Federal statute in a way in conflict with applicable decisions of this court.

5. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of law

on the theory that the contract was fraudulent and illegal despite the express finding by the District Court that there was no fraud or illegality in the transaction.

32nd Request for Findings of Act—Record 502 (a) approved in the Trial Court's opinion, Record 475 (a).

6. The United States Circuit Court of Appeals for the Third Circuit by affirming the trial court's decision has decided an important question of fundamental law in disregard of the applicable provisions of the Pennsylvania Negotiable Instruments Law and contrary to the established decisions of the courts of Pennsylvania which have been followed by this circuit and district.

In re Redmond, 15 Fed. Supp. 923.
Pa. Act of May 16, 1901, P. L. 194, Section 53, 56 Purdon 133.

7. The United States Circuit Court of Appeals for the Third Circuit has completely ignored the equities of the petitioners by permitting the respondent to retain the benefits of the agreement, but holding the respondent was not bound thereby.

8. The Circuit Court of Appeals for the Third Circuit erred in affirming the decision of the District Court in disregard of the error of the District Court in holding the contract unenforceable because of indefiniteness.

9. The Circuit Court of Appeals for the Third Circuit erred in failing to consider the errors committed by the District Court in ruling the agreement was unenforceable because of lack of proof, and in refusing to admit certain evidence.

Prayer For Writ.

WHEREFORE your petitioners pray that a writ of certiorari issue, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Cir-

cuit, commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and the proceedings of the said United States Circuit Court of Appeals in the case at bar and entitled on its Docket, No. 8805, Harry J. Alker, Jr., Mamie DuBan, Individually and as Executrix of the Estate of Alfred A. DuBan, deceased, Appellants, versus Federal Deposit Insurance Corporation, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Third Circuit may be reversed by the Court, and for such further relief as this Court may deem proper.

And your petitioners will ever pray.

Harry J. Alker, Jr.,
Mamie DuBan,
Individually, and as Executrix of the Estate of Alfred A. DuBan, deceased,

By Edwin Hall, II,
A. D. Bruce,
Harry J. Alker, Jr.,
Allen J. Levin,
Stanley Folz,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 151 Fed. (2d) 907. The opinion of the District Court is not reported, but is set forth in the Record at pages 475a-481a.

II. Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Sec. 347 (a).

The date of the judgment of the Circuit Court of Appeals for the Third Circuit herein sought to be reviewed is November 7, 1945. A petition for rehearing filed with the Circuit Court of Appeals was denied on December 12, 1945.

III. Statement of the Case.

In 1929 Harry J. Alker, Jr., borrowed from the Integrity Trust Company about $600,000, giving his note therefor, and as security various collateral, worth far in excess of the loan. Later the Trust Company split the loan and had Mr. Alker execute on May 25, 1931, two demand notes in favor of the Integrity Trust Company, one for the sum of $350,000 and one for $242,150, the securities remaining as collateral for the two notes. Not all of the securities so pledged were the property of Mr. Alker. Some of them belonged to M. Lois Corson, a sister; Marion Alker, a sister; Henry F. Corson, a brother-in-law, and Alfred A. DuBan, a friend. Henry F. Corson died in December 1942 and Alfred A. DuBan died on November 12, 1938.

Mr. DuBan had helped Mr. Alker on a number of occasions when his loan had become in such condition that

additional collateral was required, due to the adverse condition of the market.

Between May 26, 1931, and September, 1931, the prices of the collateral had fallen to such low levels, and the general financial condition was so chaotic, that the Integrity Trust Company requested Alker to deposit additional collateral in order more adequately to secure the loan. Having no more collateral of his own, Alker went to DuBan. The latter, even though he had already lent 3400 shares of common stock of National Dairy Products Corporation to Alker, which was already deposited as collateral, was willing to lend Alker an additional 1000 shares of the common stock of the National Dairy Products Corporation to be used as additional collateral, providing and on condition that the Integrity Trust Company and Alker would work out some arrangement whereby there would be at no future time any further demand for additional collateral, and the entire collateral would not be disturbed until financial conditions would improve and restore the same to such prices so that all parties would get out without any loss to them.

William F. Fischer, who was a director of the Integrity Trust Company, and also on its Executive Committee, acted as the intermediary between the Trust Company, Alker and DuBan. Through Mr. Fischer, it was finally orally agreed between the Integrity Trust Company, on the one hand, and DuBan and Alker on the other, that the bank would not make any further demand for additional collateral and the loan would not be disturbed, but it would be maintained in status quo until the equities of the various persons who put up collateral could be worked out, provided DuBan put up 1,000 shares of the common stock of the National Dairy Products Corporation and Alker made an assignment to the bank of a number of substantial fees which he had earned, but had not yet been paid, and would take out additional life insurance in the amount of $100,000 so that the total of the policies held by the Trust Company on Alker's life would amount to $125,000; Alker agreed to

pay the annual premiums on the insurance and the interest on the loan. This agreement was oral, and not reduced to writing. Because of, and relying on this oral agreement, DuBan put up the 1,000 additional shares of National Dairy Products Corporation stock as collateral in September, 1931. Alker assigned the fees and took out additional life insurance in favor of the Trust Company and has ever since paid the annual premiums on the said insurance, and paid or tendered the interest.

Until 1936 nothing unusual happened. Alker paid the premiums on the insurance each year which amounted to about $5,000 annually. He also paid the interest first at 6% and afterwards 5% on the loan; made payments on account of principal of the loan and paid over the assigned fees as received. During all this time the security market had improved very little. In fact at times it had been in a very weak condition, but no further demands were made for collateral because of the aforesaid oral agreement.

Towards the end of 1936 the Bank Examiner told the Integrity Trust Company that it should secure a new note from Alker, as the originals were five years old. To comply with this request, Alker executed a new note in favor of the Bank on December 11, 1936, for $564,367.31. The Trust Company wrote on the note, prior to the execution and delivery thereof the following provision:

> "This note is given in substitution for and continuance of my demand notes in the original amount of $350,000.00, dated May 26, 1931 and $242,150.00 reduced by payments on account to $214,367.51, dated May 26, 1931. Other collateral forwarded."

Alker was advised by a representative of the Trust Company that this provision was for his protection. Nothing unusual happened for some time thereafter. Alker kept on paying the insurance premiums, the interest on the note every month, and the assigned fees as received. He also made some payments on account of the principal of the loan.

In 1936 the insurance policies were renewed by the Trust Company. The new renewal policies expire in 1946.

On November 12, 1938, Alfred A. DuBan died, and letters testamentary were granted to Mamie A. DuBan on November 21, 1938, by the Register of Wills of Philadelphia County, and the grant of letters testamentary was duly advertised. The Trust Company was familiar with this fact, and in compliance with the aforesaid agreement the loan was continued, undisturbed, as previously.

In January 1940 the Integrity Trust Company ceased to do business. Its assets were assigned to the Federal Deposit Insurance Corporation. Among these assets were Alker's note dated December 11, 1936, with the notation as previously stated, together with the insurance policies, the assignment of fees, and all other collateral. On February 29, 1940, Mr. Teft, the chief supervisor of the Federal Deposit Insurance Corporation, wrote Mr. Alker requesting a conference to discuss his loan. The letter stated that it (Federal Deposit Insurance Corporation) understood there was an oral agreement concerning said loan and they wanted to discuss it.

After a conference with Mr. Teft, during which Mr. Alker stated the terms of the oral agreement, the loan was handled by the Federal Deposit Insurance Corporation in exactly the same way as previously, with Alker paying the monthly interest, insurance premiums, and making some payments on account of principal of the loan. Subsequently Mr. Holl, the local head of the Federal Deposit Insurance Corporation, had Mr. Alker and Mr. Fischer in his office and he was fully advised of the circumstances surrounding the execution of the Alker note, including the oral agreement.

Late in 1942 the Federal Deposit Insurance Corporation endeavored to have the DuBan National Dairy Products Corporation stock, pledged as collateral for the loan, transferred to its name. Both Mr. Alker and Mrs. DuBan, as executrix, protested against this. Mr. Alker and Mrs.

DuBan advised the Federal Deposit Insurance Corporation that such a transfer was contrary to and in direct violation of the oral agreement with the Integrity Trust Company. The Federal Deposit Insurance Corporation insisted on the transfer. Mr. Alker advised the National Dairy Products Corporation that such a transfer was improper and that Corporation accordingly for a long time refused to transfer the stock. Finally the Federal Deposit Insurance Corporation had the stock put in its name as pledgee, against the protests of Alker and Mrs. Duban, as executrix of the estate of Alfred A. DuBan, deceased.

A short time thereafter the Federal Deposit Insurance Corporation demanded that the note be paid in full. Alker advised the plaintiff that such was contrary to the oral agreement with the Integrity Trust Company, the plaintiff's assignor of the note. Nevertheless the plaintiff insisted and sold all the collateral to itself, except the life insurance and a fee of $50,000.00 due Alker by the Commonwealth of Pennsylvania, at a so-called alleged private sale for $358,336.50 on January 20th, 1943. The alleged sale was not advertised, no notice of it appeared on the bulletin board in the corridor of the Federal Deposit Insurance Corporation, and the alleged sale took place in a room on the second floor rear of the Corporation's building late in the afternoon, with no one present except two employees of the Corporation.

This action in equity in the District Court of the United States for the Eastern District of Pennsylvania was then instituted. The Federal Deposit Insurance Corporation sought a judgment against Alker for $110,098.34 with interest from June 1, 1943, and a decree directing the National Dairy Products Corporation and its agents to transfer 4400 shares of stock registered in the name of Federal Deposit Insurance Corporation, Pledgee, to the Federal Deposit Insurance Corporation without qualification, and to pay to said corporation all dividends declared and payable thereon since November 20, 1942.

The action was brought on the promissory note executed on December 11, 1936 by the defendant Alker payable to himself and endorsed immediately by him to the Integrity Trust Company which later assigned it to the Federal Deposit Insurance Corporation in January, 1940. The said corporation claimed it was a holder in due course of the note. The defendants denied this and averred that there was an oral agreement which prevented the corporation from being a holder in due course, making it subject to any and all defenses.

The trial of the same was duly held. The Chancellor relying largely on the testimony of Walter Hardt, former President of the Trust Company and a witness for the plaintiff, rendered an opinion for the plaintiff. Motion for new trial was filed by the defendants, but before the hearing on the motion the said Walter Hardt (although at the trial he had said his memory was hazy and he could not remember the agreement) voluntarily filed of record an affidavit to the effect that the Trust Company was committed to a plan not to sell the collateral without Alker's consent until such time as agreeable to him provided the interest was paid and the insurance maintained. In spite of this affidavit, the motion for new trial was denied by the Chancellor.

An appeal was taken to the Circuit Court of Appeals by the defendants Alker and Mamie DuBan. The Circuit Court affirmed the judgment of the lower Court, basing its action on the D'Oench, Duhme decision and section 12 U. S. C. A., Section 264 (s). A petition for rehearing was filed and a rehearing denied.

IV. Specification of Errors.

1. The United States Circuit Court of Appeals for the Third Circuit has misconstrued and wrongfully applied the decision of this court in *D'Oench, Duhme & Co., Inc., v. Federal Deposit Insurance Corporation,* 315 U. S. 447, extend-

ing it to a situation in no way within the scope of that decision, the facts being entirely different.

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U. S. 447.

2. The United States Circuit Court of Appeals for the Third Circuit has, in relying upon Section 12B (s) of the Federal Reserve Act, Section 12 U. S. C. A. Section 264 (s) in support of its conclusion, misconstrued an important Federal statute in a way in conflict with applicable decisions of this court.

3. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of law on the theory that the contract was fraudulent and illegal despite the express finding by the District Court that there was no fraud or illegaliy in the transaction.

32nd Request for Findings of Fact—Record 502 (a) approved in the Trial Court's opinion, Record 475 (a).

4. The United States Circuit Court of Appeals for the Third Circuit has completely ignored the equities of the petitioners by permitting the Respondent to retain the benefits of the agreement, but holding the Respondent was not bound thereby.

5. The United States Circuit Court of Appeals for the Third Circuit by affirming the trial court's decision has decided an important question of fundamental law in disregard of the applicable provisions of the Pennsylvania Negotiable Instruments Law and contrary to the established decisions of the courts of Pennsylvania which have been followed by this circuit and district.

In re Redmond, 15 Fed. Supp. 923.

Pennsylvania Act of May 16, 1901, P. L. 194, Section 53, 56 Purdon 133.

6. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of fundamental law on a theory which was not alleged or set forth in any of the pleadings, and as to which the Respondent offered no evidence.

THEORY OF "SECRET AGREEMENT."

7. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of fundamental law in conflict with a decision of the United States Supreme Court.

Deitrick v. Standard Surety Company, 303 U. S. 471.

8. The Circuit Court of Appeals for the Third Circuit erred in affirming the decision of the District Court in disregard of the error of the District Court in holding the contract unenforceable because of indefiniteness.

9. The Circuit Court of Appeals for the Third Circuit erred in failing to consider the errors committed by the District Court in ruling the agreement was unenforceable because of lack of proof, and in refusing to admit certain evidence.

V. Argument.

1. The Circuit Court of Appeals for the Third Circuit Erred in Holding That the Oral Agreement Fixing the Maturity of a Demand Collateral Note, For Valuable Consideration Was a "Secret" Agreement and Hence Unenforceable Against the Federal Deposit Insurance Corporation.

The decision of the Circuit Court of Appeals was based on the express ground that the contract relied upon by petitioners was a "secret" agreement, within the ruling of this Court in the case of *D'Oench, Duhme & Co., Inc., v. Federal Deposit Insurance Corporation,* 315 U. S. 447, and hence unenforceable against the Federal Deposit Insurance Corporation. In its opinion, the Circuit Court said (R.):

> "It will be apparent immediately on an examination of the opinion of the Supreme Court in D'Oench, Duhme & Co. v. F. D. I. C., 315 U. S. 447, how closely the facts of that case resemble those at bar. The differences which exist are immaterial. The contract which we have assumed existed in the precise terms contended for by the individual defendants is a "Secret" agreement within the ruling of the Supreme Court in the D'Oench, Duhme case. See the provisions of 12 U. S. C. A. Sec. 264 (s). As such it is not enforceable against F.D.I.C.".

The fundamental error of the Circuit Court of Appeals lies in its ruling that the present case was squarely within the ruling of this Court in the *D'Oench, Duhme* case and accordingly controlled by that case.

In that case there was a written agreement in the form of receipts separate from the notes to the effect that the notes need never be paid and all interest repaid. This Court in that case ruled this was a secret agreement which violated the Federal policy under section 12B (s) of the

Federal Reserve Act, 12 U. S. C. A., section 264 (s) of protecting the Federal Deposit Insurance Corporation in its various functions against such arrangements.

In the case at bar the situation was entirely different. The bank in 1931 requested additional collateral because the value of the collateral had fallen below the required amount. After negotiations, the bank agreed not to disturb the loan or collateral, provided Alker would assign to it as additional collateral certain fees due him, would take out and maintain additional policies of insurance on his life, payable to the bank, and maintain the interest payments on the loan, and provided that in addition DuBan would put up 1,000 more shares of his National Dairy stock as additional collateral for the Alker loan. Alker and DuBan complied with these conditions and Alker has continued to pay interest amounting to over $25,000 a year and to maintain the additional life insurance at an annual cost of $5,000, which insurance has not expired. Yet the decision of the Circuit Court of Appeals permits the Federal Deposit Insurance Corporation (as well as the bank whose assets it took over) not only to retain all the benefits of this additional collateral, but also to repudiate the promise of the bank given in consideration therefor, and to enforce, while the agreement was still in effect, the original obligations of Alker.

That the *D'Oench, Duhme* case not only was never intended to apply to the present case, but also that the fundamental principles of equity flatly oppose its application, is immediately apparent and will be conclusively demonstrated by a careful consideration of the pleadings and evidence in the case at bar, the express findings of the District Court, and the authorities which are properly controlling in this case.

The patent and significant distinctions between the cases are that:

(1) In the *D'Oench, Duhme* case the agreement of the bank was made in consideration of an act (execution and delivery by the defendant of the note) having the purpose

and effect of falsely enhancing the bank's assets, whereas the agreement of the bank in the instant case was made in consideration of an actual enhancement of the bank's assets, which were retained by the bank and the Federal Deposit Insurance Corporation; and

(2) In the *D'Oench, Duhme* case the agreement attempted to prevent collection from *ever being enforced.* That agreement consisted of receipts for the notes, which said the notes would not be called for payment and all interest payments would be repaid. The receipts were executed contemporaneously with the notes. *In the present case the oral agreement merely attempted to fix the time at which, if no previous default took place, the principal of the note became due and payable and could be collected. The agreement in this case was entered into subsequent to the execution of the note and was merely for the purpose of fixing the maturity of the note.*

Moreover, there are a number of other differences between the facts of the two cases. The most important of these are:

(a) The *D'Oench, Duhme* case was an action at law, whereas the present case is one in equity, thereby making the respondent subject to any and all equitable defenses which your petitioners may have, but which would not be available in an action at law.

(b) In the *D'Oench, Duhme* case payment of interest on the notes stopped about six years before the date of the alleged sale, whereas in the present case all the interest was paid up to the date of the alleged sale. From January, 1940, to January 23, 1943, said interest payments were made to, and accepted by, the Federal Deposit Insurance Corporation—a period of three years, further evidence of the lack of fraud or secretiveness.

(c) In the *D'Oench, Duhme* case the security for the notes consisted of defaulted bonds. In the present case the

security for the note consisted of the original valuable stocks, bonds, and insurance, besides additional security in the form of $100,000.00 additional life insurance (the premium on which cost about $5,000.00 annually), a large number of substantial legal fees, and an additional 1000 shares of National Dairy products common stock.

All the insurance premiums were regularly paid, and all assigned fees received but one, which has not yet been paid. In the present case we have valuable collateral for the note. In the *D'Oench, Duhme* case there was nothing but defaulted bonds.

(d) The note sued on in this case contained the following endorsement on its face:

> "This note is given in substitution for and continuance of my demand note in the original amount of $350,000.00, dated May 26, 1931, and $242,150.00 reduced by payments on account to $214,367.57, dated May 26, 1931. Other collateral forwarded."

There was no such notation on the note in the *D'Oench, Duhme* case.

The testimony offered by both sides as to the effect of this notation more than sustains your petitioners' contention that this should have put the respondent on notice that this was an unusual transaction. This is true especially since the parties were in equity. Furthermore, the presence of life insurance and assigned fees as security for the note in this case should also have put the respondent on notice.

It is submitted that, in view of the great difference in the facts between this and the *D'Oench, Duhme* case, the Circuit Court clearly erred in holding that as a matter of law this case was ruled by the *D'Oench, Duhme* case.

2. The United States Circuit Court of Appeals for the Third Circuit Has, in Relying Upon Section 12B (s) of the Federal Reserve Act, 12, U. S. C. A., Section 264 (s) in Support of Its Conclusion, Misconstrued an Important Federal Statute in a Way in Conflict With Applicable Decisions of This Court.

(Section 264 (s) of 12 U. S. C. A.)

This act provides as follows:

> "Whoever, for the purpose of obtaining any loan from the Corporation, or any extension or renewal thereof, or the acceptance, release, or substitution of security therefor, or for the purpose of inducing the Corporation to purchase any assets, or for the purpose of obtaining the payment of any insured deposit or transferred deposit or the allowance, approval, or payment of any claim, or for the purpose of influencing in any way the action of the Corporation under this section, makes any statement, knowing it to be false, or wilfully overvalues any security, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both."

The Circuit Court used this statute along with the *D'Oench, Duhme* case as the basis for its decision. Neither the statute itself, nor any part of it was alleged in the pleadings or set up in any part of the record of the case as the basis for the F. D. I. C.'s claims. Moreover a careful analysis of this statute shows it has no application to this case at all.

This act provides, inter alia, that "whoever for the purpose of obtaining any loan from the Corporation (F. D. I. C.) or any extension or renewal thereof." In the present case before the Court, the loan was made in 1929 long before the Corporation came into existence. The renewal or extension was made by the Integrity Trust Company in 1936, when the new note was signed and insurance

policies renewed, which was almost four years before the F. D. I. C. entered the picture.

This act next provides "or the acceptance, release, or substitution of security therefor." That provision has no application for there was no acceptance, release or substitution of any security in this case.

The act then says "or for the purpose of inducing the Corporation to purchase any assets." There is absolutely nothing in this case to show that the petitioners did anything to induce the F. D. I. C. to purchase any assets.

The next phrase reads "or for the purpose of obtaining the payment of any insured deposit, or transferred deposit, or the allowance, approval or payment of any claim." The record of this case clearly shows this phrase also is inapplicable because this case does not involve any deposit or any claim by the petitioners against the bank.

The next phrase is "for the purpose of influencing any action of the Corporation under this section." This also has no application because the transaction took place years before the F. D. I. C. came into being.

The final and important part of this Act is "makes any statement, knowing it to be false, or wilfully overvalues any security, shall be punished by a fine of not more than $5,000.00, or by imprisonment for not more than two years or both." This final clause clearly makes the whole statute inapplicable, because there is nothing in the pleadings or in the testimony that the petitioners or anyone made any false statement knowing it to be false, or overvalued any securities. In order that this act might apply, there must have been a false statement or overvaluation of a security. There was none. In the absence of any false statement or overvaluation of security, the Circuit Court erred in using this statute as one of the reasons for its decision.

Moreover, if as was pointed out by Justice Frankfurter in his concurring opinion in the *D'Oench, Duhme* case, this statute could not be stretched to fit that case, certainly the Circuit Court erred in "stretching" it to meet the facts of

the present case. Judge Frankfurter held that the statute had no application to the *D'Oench, Duhme* case because the transaction in the *D'Oench, Duhme* case originated prior to the passage of the Federal statute. The same is true in the present case, and for that reason, in addition to those previously discussed, this act has no application here.

3. The United States Circuit Court of Appeals for the Third Circuit Has Decided an Important Question of Law on the Theory That the Contract Was Fraudulent and Illegal, Despite the Express Finding by the District Court That There Was No Fraud Or Illegality in the Transaction.

(32nd Request for Findings of Fact, Record 502 (a) approved in the Trial Court's Opinion, Record 475 (a).)

After the trial of this case your petitioners submitted to the Chancellor various requests for findings of fact. Among these was the 32nd request, which was

> "There was no fraud of any kind involved in this matter." (Record 502a).

This finding of fact was approved by the Chancellor in his opinion (Record 475a).

In view of this finding of fact, it is difficult to see how the Circuit Court could possibly hold as a matter of law that there was a secret agreement within the meaning of the *D'Oench, Duhme* case. Such a ruling by the Circuit Court can only mean that the Circuit Court felt there was some misrepresentation or fraud involved in the case. Yet there is no such allegation in the pleadings nor such proof in the testimony, and there is a specific finding of fact by the Chancellor there was no fraud.

The error of the Circuit Court in disregarding the finding of fact by the Chancellor that there was no fraud is quite evident in view of the decision of this Court in *Dobson v. Commissioner of Internal Revenue,* 320 U. S. 489. That

case dealt with the Tax Court and held in general that findings of facts were binding on an appellate court unless clearly erroneous.

Rule 52 of the Rules of Civil Procedure for the District Courts also requires that findings of fact shall not be set aside unless clearly erroneous. There is nothing in the record of this case to show that the finding of no fraud was erroneous. At the time of the original transaction valuable assets were delivered by petitioners to the trust company; payments have been made on the assigned fees since, and the record shows that all the interest and insurance preminums were paid to the date of the alleged sale. There was no misrepresentation, deception, or concealment. The entire transaction was handled in an open and frank manner. There was no reason for the Circuit Court to ignore the finding of the lower court.

4. The United States Circuit Court of Appeals for the Third Circuit Has Completely Ignored the Equities of the Petitioners by Permitting the Respondent to Retain the Benefits of the Agreement, but Holding the Respondent Was Not Bound Thereby.

The respondent, having brought this action in equity, is obliged to do equity. The respondent as the plaintiff is also subject to any equitable defenses the petitioners as defendants might have.

Under the first premise, it follows that the Circuit Court should, under any circumstances, have directed that the Federal Deposit Insurance Corporation return the 1,000 shares of National Dairy Products Corporation stock which DuBan put up, to his Executrix, Mamie DuBan, because the Court in its opinion has assumed the contract was as alleged by the petitioners. DuBan, by the contract, put up the stock on certain conditions. The Federal Deposit Insurance Corporation, having elected not to comply with those conditions, but to demand payment of the note, and thus summarily terminate the contract, should have been

and be obliged to return the 1,000 shares of stock to Du-Ban's representative, having stated its action in equity. In failing to so direct, the Court did not adhere to the basic principle that he who comes into equity must do equity.

5. The United States Circuit Court of Appeals for the Third Circuit by Affirming the Trial Court's Decision Has Decided an Important Question of Fundamental Law in Disregard of the Applicable Provisions of the Pennsylvania Negotiable Instruments Law and Contrary to the Established Decisions of the Courts of Pennsylvania Which Have Been Followed by This Circuit and District.

(*Pa. Act of May 16, 1901,* P. L. 194, Section 53, 56 Purdon 133; *In re Redmond,* 15 Fed. Supp. 923.)

In the present case there can be little question that the Pennsylvania law is applicable in determining whether the FDIC was a holder in due course of Alker's note. There is no dispute in this case, as there was in the *D'Oench, Duhme* case as to which state law was applicable. It is true that in the *D'Oench, Duhme* case the majority of this Court held that liability on the note was a federal not a state question, but this conclusion was based expressly on the prior rule of this court in *Dietrick v. Greaney,* 309 U. S. 190, that the legal consequences of a violation of the National Banking Act is a federal not a state question. In that case, this court said at page 201:

> "A point much discussed in brief and argument upon the assumption that local law will guide our decisions, see Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L ed 1188, 58 S. Ct. 817, 114 ALR 1487, is whether by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which con-

demns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, see Jackson County v. United States, No. 14, decided December 18, 1939 (308 US 343, ante, 313, 60 S. Ct. 285) and cases cited. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question."

As has been previously shown in this brief, there are no facts in this case which establish a violation of any provision of the Federal Reserve Act or any other Federal Act. It is therefore necessary to consider the pleadings and evidence in this case under the law of Pennsylvania where all the significant acts occurred, to determine whether the FDIC was a holder in due course of Alker's note.

Respondent's exhibit 1 consists of a promissory note executed by Alker on December 11, 1936, for the sum of $564,367.51 payable to "myself" on demand. Alker endorsed this note and delivered it to the Integrity Trust Company the same day—December 11, 1936. The record shows that the Integrity Trust Company kept this note until January 13th or 15th, 1940, when it was endorsed over to the Federal Deposit Insurance Corporation (Record, 72a-73a). This means there was no negotiation of the note from December 11, 1936, to January 15, 1940—a period of more than three years.

The respondent in its pleadings alleged it was a holder in due course. This was denied by your petitioners in their answers.

Section 53 of Article IV of the Pennsylvania Negotiable Instruments Act of May 16, 1901, P. L. 194, 56 Purdon Statutes, Section 133, provides:

"Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed to be a holder in due course."

It has uniformly been held under similar circumstances that the lapse of such a period of time before negotiation was "unreasonable" and consequently the holder was not a holder in due course.

Schmoldt v. Chicago Stone Setting Co., 309 Ill. Appeals, 377; 33 N. E. 2nd 182, a period of 16 months;

Grossman v. Chechila, 215 N. Y. Supp., 353, a period of one year;

McAdam v. Grand Forks Mercantile Co., 24 N. D. 645; 140 N. W. 725, a period of one year;

Putnam v. Reynolds, 69 Pittsburgh Legal Journal 265, a period of 2 years and 7 months;

Title Loan etc. Co. v. Fuller, 105 Kansas 395, 184 Pacific 727, a period of 20 months;

Franklin Bank v. St. Louis Car Co., 321 Missouri, 199; 9 S. W. 2nd 901, a period of 18 months.

In the present case the delay in the negotiation was for more than three years. Therefore, in accordance with the uniform interpretation of the law, the Federal Deposit Insurance Corporation was not a holder in due course due to the great delay in negotiation.

In the case of *In re Redmond*, 15 Federal Supp. 923, Judge Maris of the District Court for the Eastern District of Pennsylvania ruled that failure to present or demand payment of a demand note for more than two years amounts to an unreasonable delay and subjected the transferee to defenses. Therefore, when, as here, the delay is for over three years, the Federal Deposit Insurance Corporation as a matter of law could not be a holder in due course of the note.

6. The United States Circuit Court of Appeals for the Third Circuit Decided an Important Question of Fundamental Law on a Theory Which Was Not Alleged or Set Forth in Any of the Pleadings and as to Which the Respondent Offered No Evidence.

Theory of Secret Agreement.

The Circuit Court of Appeals in its decision assumed that the contract was *as alleged by the defendants*, but decided as a matter of law that the said contract constituted a "secret agreement" within the meaning of the *D'Oench, Duhme* case. In this the Court erred because nowhere in the entire record of the case is there any mention of a secret agreement. There is no allegation in the respondent's pleadings as set forth on pages 6a, 18a, 24a of the record of a secret agreement. In fact, the pleadings contain no reference to any illegal or fraudulent act on the part of the parties from which a secret agreement could be inferred.

In the case of *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447, the pleadings *specifically raised* the question of a misrepresentation of the assets and the condition of the bank. This was done in the reply to the answer as filed by the defendant in that case. The pertinent allegations of that reply are as follows:

> "That if, as alleged, the note here sued on and the notes prior thereto of which it was a renewal, were merely accommodation paper and given without a consideration, all of which is denied by the plaintiff, then defendant is estopped to assert said defenses for the reason that the execution of the aforesaid notes was made for the purpose of permitting the Belleville Bank & Trust Company to avoid having its books and records show any past due bonds or obligations in the assets of said bank, which would constitute a misrepresentation of the assets of said bank and deceive the creditors, State Banking authorities and this plaintiff

in any examination of the condition of said Belleville Bank & Trust Co., and this fact was well known to defendant company, its officers and agents who thereby participated in said misrepresentation. And defendant is further estopped to assert the hereinabove mentioned defense for the reason that defendant paid to Belleville Bank & Trust Company interest on said notes from August, 1926, until November, 1932, in the amount of $1,601.56 in order that the aforesaid notes would appear in the records of said Belleville Bank & Trust Company as a good asset or live paper, which likewise would serve to misrepresent the condition of said Bank to the creditors of said bank, and the examining authorities, all of which was known to defendant, its officers and agents and in which they participated."

From that pleading it is clear that there was a definite allegation that there was a definite scheme to deceive and defraud the F. D. I. C. in the *D'Oench, Duhme* case, and there then was a legal basis for the court in that case to hold that there was a secret agreement, which the defendant in that case was therefore estopped to assert.

But in the present case there is no such allegation in any of the pleadings.

Therefore, there was no legal basis for the Circuit Court to rule that the contract as alleged by your petitioners was a secret agreement.

Moreover this is an action in equity. In order that the court might even find that there was a secret agreement, there must be some proof of fraud, illegality or misrepresentation by which the secret agreement can be established. There was no testimony submitted by the witnesses for the respondent, or other evidence to that effect. Furthermore, any such evidence would have to be in the preponderance for the respondent to establish its claim.

Since there is nothing in the pleadings or evidence on which a secret agreement could be based, the Circuit Court clearly erred in holding as a matter of law that the contract was a secret agreement within the meaning of the *D'Oench, Duhme* case.

7. The United States Circuit Court of Appeals for the Third Circuit Has Decided an Important Question of Fundamental Law in Conflict With a Decision of the United States Supreme Court.

(*Deitrick, Receiver et al. v. Standard Surety & Casualty Co.*, 303 U. S. 471.)

As has already been stated, there was no allegation in the pleadings as to fraud, illegality, deception, misrepresentation or a secret agreement. The pleadings being in that condition, the decision of the Circuit Court was contrary to the rulings of this Court as laid down in the case of *Deitrick v. Standard Surety Company*, 303 U. S. 471.

In that case the receiver of an insolvent national bank sought to recover from the surety company on bonds held by the bank. The Court decided against the receiver. On p. 480, the Court said:

> "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings, the Receiver may not have judgment, he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest."

In that case there was fraud between the agent of the surety company and the president of the bank. But since the pleading made no allegation of fraud by the surety company, the Court rightly refused to allow a recovery by the receiver.

In the present case, there is no fraud alleged and none proven. Hence this case is much stronger than Deitrick v. Standard Surety Co. (*supra*), *where there was fraud.*

The decision in the *D'Oench, Duhme* case does not conflict with *Deitrick v. Standard Surety Company,* because in the *D'Oench, Duhme* case by the reply the pleadings raised the question of misrepresentation and fraud, on which the court could properly hold there was a secret agreement.

The significance of this ~~definition~~ distinction can be realized by comparing *Deitrick v. Standard Surety Company* with *Deitrick v. Greaney,* 309 U. S. 190. In the latter case suit was brought by the Receiver of a National Bank to recover payment on a promissory note given by one of the directors of the bank as a substitute for certain of the bank's own stock illegally purchased and retained by the bank.

The pleadings pertinent to this in the *Greaney* case were as follows:

> (1) "On or about June 30, 1930, the defendant Thomas E. Greaney, who was a director of Boston National Bank, and the defendant Nimon Karnow, acquired from the said bank 190 shares of its own issued and outstanding capital stock which the bank had illegally acquired . . . Ostensible payment for these shares was made by or for the said two defendants out of funds of the bank itself in the manner hereinafter stated.
>
> (2) Said ostensible payment was made by the bank's advancing to the defendant Karnow, on a note for $23,400 signed Karnow Bros., the amount of $23,203.14 which amount was thereupon placed on deposit in National Shawmut Bank of Boston to the

credit of defendant Greaney who had previously given the Boston National Bank his own check upon the Shawmut Bank for the said amount $23,203.14. The shares were thereupon transferred on the bank's records out of the names of Reed & Company, Bright Sears & Company and Ada Albert, into the name of defendant Greaney as the reputed owner of record thereof."

The illegality of the transaction was definitely set forth in the pleadings.

This Court in the *Greaney* case discussed the right of the Receiver to recover on the basis of the pleadings (page 200) and reiterated what it had stated in *Deitrick v. Standard Surety Co.* (*supra*). The Court then ruled:

> "We did not decide that in an action against one who, like respondent, is *alleged* and *proved* to be a participant in the illegal transaction, he can be heard to set up the defense of his illegal action to defeat the statutory policy aimed at the protection of creditors." (Italics ours.)

From this it is clear that all three of these cases can easily be reconciled. The decisions in the *Greaney* and *D'Oench, Duhme* cases are correct because the pleadings in each case raised the question of illegality and misrepresentation, and evidence was offered to substantiate those pleadings. In the *Standard Surety Co.* case the pleadings did not raise any question of fraud by the party sued, and hence no recovery.

It is obvious, therefore, that the Circuit Court erred in the case now before the Court when it ruled as a matter of law the contract was a secret agreement, since the pleadings allege nothing on which to base such a conclusion, there was no evidence of any misrepresentation or fraud, and there was a definite finding by the District Court that there was no fraud.

8. The Circuit Court of Appeals for the Third Circuit Erred in Affirming the Decision of the District Court in Disregard of the Error of the District Court in Holding the Contract Unenforceable Because of Indefiniteness.

As pointed out above the Circuit Court of Appeals of the Third Circuit failed to give any consideration to the errors committed by the District Court but decided the case solely and squarely on the ground that the *D'Oench, Duhme* case required a holding in favor of the Federal Deposit Insurance Corporation. Since, as has been demonstrated above, that case was in no way controlling on the present case, the Circuit Court of Appeals for the Third Circuit erred in failing to consider the error of the District Court in holding the agreement unenforceable because of indefiniteness.

In his Opinion, the Chancellor said:

> " . . . the agreement lacks essential definiteness and certainty . . . certainty as to proof and certainty as to time of performance, that is the limit of restraint." (Appendix, p. 479a.)

Just before the above quotation the court said that there may have been a "satisfactory understanding". Then the Court said:

> "No complaint may be made of the degree of cooperation shown, and in the absence of any proof whatever of an obligation to restrict plaintiff's action for any certain or even a reasonable period, the understanding or agreement may not be deemed a legally enforceable one." (Appendix, p. 479a.)

The Chancellor seems to be using the words "understanding" and "agreement" in the same sense. Webster defines an "understanding" as "an agreement of opinion or a mutual agreement not formally entered into but having definite engagements". It is therefore apparent that the trial court meant that there was an agreement between

the defendant and the plaintiff's predecessor in title, the Integrity Trust Company, but that the agreement was not enforceable because of lack of certainty as to time of performance and proof. Moreover, the Chancellor described this as not just an understanding, but a satisfactory understanding.

Let us now consider whether the Court erred in holding the agreement unenforceable because of lack of certainty of time of performance.

The clearest testimony as to just what the agreement was, was that of Mr. Fischer, a disinterested witness for the defendants. Mr. Fischer testified: (Record, p. 249a.)

> "A. But before we saw Mr. Hardt we saw Mr. Semisch and we put DuBan's proposal to Mr. Semisch that Mr. Alker's note would not be disturbed, and that he would put up that additional collateral. He says, I would have to see the boss, meaning Mr. Hardt, and we went into Mr. Hardt's office, and the thing was debated there. So then we got together, and we came out of the office. He says, 'we will go along, but we would like to have additional insurance.' . . . (Record, p. 249a.)
>
> "A. Mr. Hardt said he would agree to that proposal, that he would not disturb the loan so long as the interest is met every month and the policies are kept up, that is, if the premiums . . ." (Record, p. 249a.)

The Chancellor ruled that since there was no definite limit of time for the duration of the loan and for restraint of any action by the plaintiff the agreement was unenforceable. In this the Chancellor erred.

The general rule on this is that uncertainty as to subject matter may make a contract unenforceable, but not uncertainty as to time of performance. The law on this in Pennsylvania is clearly expressed in *Rossmassler, Appellant v. Speilberger*, 270 Pa. 30. On pages 40 and 41 the Court said:

" . . . Appellants' error arises from assuming that because no period of duration is stated, the contract must be held void for uncertainty, whereas the Courts will always deduce the term from the nature of the subject-matter, if it is at all possible so to do. The law does not favor, but leans against the destruction of contracts because of uncertainty. Therefore, the Courts will, if possible, so construe the contract as to carry into effect the reasonable intention of the parties if that can be ascertained. Though there are some formal imperfections in a written contract, still it is sufficient if it contains matter which will enable the Court to ascertain the terms and conditions on which the parties intend to bind themselves. The maxim, Id certum est quod certum reddi potest, applies. 6 Ruling Case Law 645. 'Apart from contracts which, from their inherent nature, imply a power of revocation, it would seem that the intention of the parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by silence as to any time limit or power of revocation. Although there appears to be some authority to the contrary, the rule seems to be that 'where no limitation is expressed in the agreement, neither party can terminate it without the consent of the other, unless the making of the contract itself indicates with sufficient clearness that the parties must have intended some other determination.'"
See also *Surant v. Ostroski,* 25 Pa. D. C. 47, 50.

The Federal Courts have also followed the above quoted ruling. In the recent case of *American Type Founders v. Lanston Monotype Machine Co.,* 45 Fed. Supp. 531, Judge Bard of the District Court on p. 534, said:

"The absence of a provision as to termination cannot be said to indicate that either plaintiff or defendant intended the contract to be terminable at will, in

view of the possible advantages to each of them in having it continue for an indefinite period."

In the case now before the Court, considering the rising condition of the market and the fact that the plaintiff admitted all the interest and premiums on insurance had been paid up to date of the sale, it was certainly to the advantage of the parties to have this agreement continue so long as interest on the note and the insurance premiums were paid.

The last mentioned case was appealed to the Third Circuit Court of Appeals and is reported in 137 Fed. 2nd 728. On p. 731 the Circuit Court said:

> "As was said by the Supreme Court of Pennsylvania in Rossmassler v. Spielberger, 270 Pa. 30, 41, 112 A. 876, 880, quoting from Ruling Case Law, 'Apart from contracts which, from their inherent nature, imply a power of revocation, it would seem that the intention of the parties to an agrement, *that it should be perpetual and without limit as to duration could not be more properly expressed than by silence as to any time limit or power of revocation.*" (Italics ours.)

A similar ruling was pronounced by the Tenth Circuit Court in *Miller v. Miller,* 134 Fed. 2d Series, 583. In that case the trial court had found for the appellee, and on appeal the lower court was reversed. The lower court had entered judgment for the appellee on the ground that the contract was unenforceable because of indefiniteness, uncertainty and vagueness, and this was reversed by the Circuit Court.

The recent case of *D'Orazio v. Mascinantonio,* 345 Pa. 428, is very similar to the present case. There a mortgage was involved. The mortgage was dated March 19, 1925, payable in three years with interest at 6%, payable semi-annually. Foreclosure proceedings were instituted. The defense was a written agreement, dated July 27, 1935, to the effect that as long as interest from March 14, 1935, was paid at the rate of 3% per annum, the mortgage would not

be considered in default, and there was to be no foreclosure as long as interest was paid. The lower court held the agreement showed the debt was to be paid sometime and that meant a reasonable time, and since the mortgage was 17 years old and 7 years had passed since the agreement, the debt had not been paid in a reasonable time and rendered judgment for the plaintiff. The Supreme Court of Pennsylvania reversed the lower court, and held that the agreement not to foreclose was enforceable so long as defendant complied with its terms, although no date of maturity was specified. The Court said (p. 431):

> "That is an agreement the parties had a legal right to make. It in no way contravenes public policy."

A case very similar to this case is *Newburger v. Eckerson,* 318 Pa. 72 (1935). There, the defendant opened a brokerage account with Newburger, Henderson & Loeb, whose business was taken over in January, 1931, by a successor firm—Newburger, Loeb & Company. In 1927, the defendant had signed a card consenting to the sale of her securities without notice or demand. A similar card was signed by defendant for the successor firm in January, 1931. In June, 1931, the successor firm sold the collateral and closed out the account. An action by the brokerage firm to recover the balance of indebtedness was brought and the defendant counterclaimed, alleging that in December, 1930, the predecessor firm had agreed orally with the defendant to carry the account for two years without further demand for margin, at which time additional collateral was deposited with the predecessor firm by the defendant. The testimony of the defendant, consisting only of that of the defendant herself and her attorney, was credited and the defendant recovered a certificate against the plaintiff. Judgment entered thereon was affirmed by the Supreme Court of Pennsylvania.

From these cases it is clear that just because a contract or agreement fails to set forth a definite time for its

termination or for any restraint of action by the plaintiff is no ground for holding that the agreement is unenforceable. Moreover such types of contracts are not against public policy. There was no intention in the case now before the court not to pay the principal of the obligation as in *D'Orazio v. Masciantonio* (supra). The payment of the principal was merely postponed until October of 1946, when the insurance policies expire. This, as has been shown, does not affect the enforceability of the contract. The Chancellor therefore erred in his ruling that the agreement was unenforceable because of uncertainty as to time of performance. Even if the agreement were perpetual and without limit as to duration, it would be proper and enforceable.

9. The Circuit Court of Appeals for the Third Circuit Erred in Failing to Consider the Errors Committed by the District Court in Ruling the Agreement Was Unenforceable Because of Lack of Proof, and in Refusing to Admit Certain Evidence.

A further error of the Circuit Court of Appeals resulting from its conclusion that the *D'Oench, Duhme* case was controlling of the present case was its failure to consider the District Court's errors in refusing to admit his relevant evidence and in subsequently ruling that the agreement relied upon by the petitioner was unenforceable because of lack of proof.

In his opinion the Chancellor said the agreement was unenforceable because of lack of proof. (Record, p. 479a.) The Court also said that the defendants' proof consists entirely of the conversation of September 29, 1931, plus the additional fact that the bank and its transferee did not demand payment or sell the collateral for eleven years. (Record, p. 478a.) In so ruling the Chancellor completely ignored the interest payments, the life insurance policies and the assigned fees. At the time of the conversation of September 29, 1931, in return for the bank agreeing to make

no further demands on him for additional collateral and not to sell him out, defendant Alker agreed to pay the premium on $100,000.00 additional life insurance to be issued in favor of the bank. The bank already had $25,000.00 insurance on Alker's life in its favor. The policies were produced at the trial by the plaintiff when Mr. Fink was cross-examined. (Record, pp. 159a-160a.) At the same time Alker agreed to assign to the bank certain fees which he had earned, but had not then received. The assignment of the fees was also produced by Mr. Fink at the trial. (Record, p. 160a.) The annual premium on the insurance policies amounted to about $5,000. This has been paid every year since 1931 until the present. Consequently the defendant Alker has paid out $65,000.00 for insurance premiums for the benefit of the bank and the present plaintiff. Surely no one would do that, besides paying the interest and assigned fees unless there was a definite agreement. Yet the Chancellor says the defendant's proof consists only of the oral conversation of 1931 and the fact there was no demand for payment for eleven years, completely disregarding all the money the defendant Alker paid out in insurance premiums and assigned fees.

The Chancellor further erred when he refused to permit the defendants to introduce evidence to show that in 1936, when the new note was issued, and on which this suit is based, the bank arranged to have new insurance policies issued that do not expire until 1946. Alker continued to pay the premiums on the new policies. The defendants' offer of proof was as follows:

> "MR. SABLOSKY: I have the dates—that a few days prior to October 28, 1936, or on or about that date, Mr. Sante Marie, an insurance agent, was sent to the Integrity Trust Company to see the president or executive officer of the bank with reference to the fact that his insurance which had been put up as collateral as one of the terms of the alleged oral agreement with the Integrity Trust Company, was expiring and had to be

replaced; that Mr. Santa Marie spoke to the executive officer of the Integrity Trust Company, explained to him that the trust company could get a one-year term, five-year term or ten-year term policy on Mr. Alker's life as the collateral needed, that the officer told him that they would prefer the ten-year renewal term which was insurance of annually expiring term insurance but renewable for a term of ten years. We will show that that carried a cheaper premium than a straight ten-year policy, therefore was beneficial to Mr. Alker, and to show that after receiving these instructions from the execuitve officer of the Integrity Trust Company, the policies which I believe were offered in evidence—no, the policies which were referred to in evidence, being Policy 703,294 of the Manufacturers Life Insurance Company——

THE COURT: On the life of whom?

MR. SABLOSKY: On the life of Harry J. Alker, Jr., in the amount of $45,000, and Policy No. 703,203 of the Manufacturers Life Insurance Company on the life of Harry J. Alker, Jr., in the amount of $55,000, both of which have the effective date of October 28, 1936, were delivered to the Integrity Trust Company.

MR. OLMSTED: Is that the offer?

MR. SABLOSKY: That is the offer of proof.

THE COURT: What is your other inference?

MR. SABLOSKY: The other inference is this: It may be an important factor in reaching a conclusion as to what a reasonable time would be for considering this alleged oral contract as being effective in view of the fact that we do not contend that the bank was obliged to carry this loan forever without selling the stock under any circumstances, and to show that the officer of the bank had picked this particular policy which had a renewal for ten years would show that the bank evi-

dently was of the opinion that a ten year period from the date that the policy was to become effective was a reasonable time to continue on with the alleged oral contract, should Your Honor find that there was an alleged oral contract.

THE COURT: I sustain the objection and give you an exception. You might take that view of it but in view of all the testimony that we have in the case, the admitted facts and the record of the insurance policies and so forth, and the oral testimony as well, I do not think we need it. I do not think it will help us in solving the problem one way or another; I do not, Mr. Sablosky. I do not think it would warrant me in doing that." (See Record, pages 449a-451a.)

The Chancellor by refusing to permit this witness to testify for the defendants prevented the defendants from further showing the intention of the parties as to what they considered to be the time for the termination of the contract and thereby supplying the very element in the contract which the Chancellor said was necessary—to wit: a definite time for the duration of the agreement. Yet the Chancellor, after refusing the defendants the opportunity to prove the time for duration of the agreement, held in his opinion that the agreement was unenforceable because of uncertainty as to its termination, completely ignoring the insurance policies and the assigned fees. This witness would have established that the bank of its own accord, not the defendants, had the new policies issued for a ten year period, whereas the bank could have had the policies for shorter terms such as one, three, or five years if it had so desired instead of ten years, and hence the bank must have contemplated the loan would run until 1946.

The law on this is very well set forth in *Miller v. Miller*, 134 Fed. 2nd 583. On p. 588 the court said.

"But how long was the agreement to endure? Clearly no limitation is expressed in the agreement, and

it must be determined by necessary implication. It is a fundamental and well recognized rule that in construing contracts, courts must look not only to the specific language employed, but also to the subject matter contracted about, the relationship of the parties, the circumstances surrounding the transaction, or in other words place themselves in the same position the parties occupied when the contract was entered into, and view the terms and interest of the agreement in the same light which the parties did when the same was formulated and accepted.

"If no period of duration is specified in a contract, and none can be inferred from its nature and subject matter, the law infers the parties intended such agreement to be terminated at the pleasure of either party upon reasonable notice. If, however, a period of duration can be fairly implied from the nature of the contract, its subject matter, and the relationship of the parties, the contract is not terminable at the pleasure of either party and the court will give effect to the manifest intent of the parties. 17 C. J. Contracts 398.

Otherwise stated ". . . where no limitation is expressed in the agreement, neither party can terminate it without the consent of the other unless the contract itself indicates with sufficient clearness that the parties must have intended some other termination.

American Jurisprudence, Vol. 12, Section 305."

The agreement in question had no specific time set for its duration, but the circumstances under which it was entered, the condition of the stock market for the past ten years, and the circumstances under which the policies of insurance were issued were all factors from which a period of duration could be readily inferred by the Chancellor. Hence he erred in ignoring the policies of insurance, and in refusing to permit the witness for the defendants to testify about the way the policies were handled by the bank.

This being an equitable action the Chancellor should, all the more, have admitted the said testimony.

In the case of the *Cumberland Valley Railroad Company v. R. R. Cos.*, 177 Pa. 519, 563, the court said:

> "It is further argued that as the term for which the contract was made is not fixed, therefore it continued only during the will of the parties, and might be revoked by either on notice. This, as a general proposition, if the fact were as stated, is correct, and it is so held in Phila. etc., Railroad v. River Front Railroad, 168 Pa. 357, and the authorities there cited. But the term in this contract is fixed by the plainest implication, the bonds to be purchased ran for thirty years, the obligation of the plaintiffs was to set aside annually fifteen per cent of the gross receipts to be used in annual purchase of the bonds. The term of the defendants' obligation under the joint contract must be coextensive as to time with plaintiffs' obligation to set aside and pay; that is, thirty years."

From the above quotation it is apparent how important the insurance policies are to this case. The defendant Alker was obliged to set aside each year and pay to the insurance companies the sum of $5,000.00 which was for the benefit of the bank and the plaintiff. The policies expired in 1936 and the bank arranged to have the policies run for another ten years until 1946. Therefore until 1946 the defendant Alker was obliged to pay the $5,000.00 annually on the premiums. This further shows the great harm done to the defendants by the Court's refusing to allow the witness, Mr. Santa Marie, the Insurance Agent, to testify as to the circumstances and events surrounding the issuance of the new policies. His testimony would have corroborated the defendants' contention that there was a definite term to the agreement. He would have established that the bank must have contemplated the loan was to run until 1946 because the bank could have taken out policies for a

much shorter term. Hence the Chancellor erred in ruling that there was a lack of proof by the defendants to substantiate their contentions.

Conclusion.

It is submitted for the foregoing reasons that this case is not governed by the decision in the D'Oench, Duhme case, and that great confusion will result, and great injustice will be done in this, and similar future cases if this decision of the Circuit Court of Appeals is permitted to stand, and therefore the petition for certiorari should be granted.

Respectfully submitted,

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(13)

No. 880

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

Opinions Below

The opinion of the trial court (R. 475a), the District Court for the Eastern District of Pennsylvania, is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 151 F. (2d) 907.

Jurisdiction

The judgment sought to be reviewed was entered on November 7, 1945, by the Circuit Court of Appeals for the Third Circuit (R. 561); a petition for rehearing was

denied by that court on December 12, 1945 (R. 571). The petition for a writ of certiorari was filed on February 23, 1946. Petitioners rely upon section 240(a) of the Judicial Code as amended (U. S. C. Title 28, section 347(a)).

Questions Presented

1. Whether the United States District Court properly found, as a question of fact, that no oral agreement existed between the Integrity Trust Company and the petitioner Alker by which the bank, and the Federal Deposit Insurance Corporation as its transferee, were legally bound to refrain from demanding payment of a promissory note executed to the bank by Alker, or from liquidating the collateral security in accordance with the terms of the note, or from exercising the rights expressly granted therein.

2. Whether the Court below properly ruled that, even if such an oral agreement did exist, it constituted a "secret" agreement within the ruling of this Court in *D'Oench, Duhme & Co. Inc.* v. *FDIC,* 315 U. S. 447, reh. den., 315 U. S. 830, and was not enforceable against the Federal Deposit Insurance Corporation.

Statement of Case

This is a civil suit brought by the Federal Deposit Insurance Corporation to recover a deficiency judgment against the defendant Alker for the balance due from him on a demand note, after crediting the proceeds of the sale of 4400 shares of National Dairy Products Corporation common stock and other marketable collateral held as security, for an adjudication that neither the defendant DuBan nor the Estate of Alfred A. DuBan has any interest in said shares of National Dairy stock, or the dividends declared thereon since November 20, 1942, and for a decree requiring the defendant National Dairy to transfer the stock upon its books to the Federal Deposit Insurance Cor-

poration and to pay the latter all dividends accrued thereon (R. 24a). After trial without a jury the court filed an opinion (R. 475a) and judgment was entered for the plaintiff against the defendant Alker in the sum of $117,581.35 (R. 493a) and National Dairy was directed to make the said transfer and to pay over the said dividends (R. 492a). Upon appeal by Alker and DuBan (R. 507a) the judgment was affirmed by the Circuit Court of Appeals for the Third Circuit.

The pertinent facts surrounding this litigation are as follows: In October 1929 the defendant Alker had a large broker's loan secured by marketable collateral which was taken over by the Integrity Trust Company on a collateral demand note in the amount of $592,150 secured by various stock, including 3400 shares of National Dairy Products Corporation common stock loaned to Alker by Alfred A. DuBan for that purpose. At the instance of the Trust Company, Alker executed two notes in May 1931, in the amount of $350,000 and $242,152, respectively, to replace the original note and secured by the same collateral (R. 182a). The market value of the securities declined and the Trust Company demanded additional collateral (R. 184a). Pursuant to the demand, Alker and Fischer, a director of the bank, acting as intermediary for Alker, conferred with certain of its officers, particularly its president Hardt. To meet the demand Alker deposited 1,000 more shares of National Dairy stock, which he borrowed for the purpose from Mr. DuBan, took out an additional $100,000 of life insurance (having already theretofore pledged $25,000 of insurance), and executed a document purporting to assign, so far as they were assignable, claims against the Commonwealth of Pennsylvania for legal services (R. 183a).[1]

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[1] Alker testified that "the Commonwealth doesn't recognize assignments and the fees came to me" (R. 203a).

On December 11, 1936, Alker executed the note on which this suit is brought. It is an ordinary collateral form note payable on demand, listing the items of collateral, and containing the notation that it was given "in substitution and continuance" of the demand notes of May 26, 1931 (R. 508a). Interest thereon was paid and a number of payments were made on account of principal and duly endorsed on the note.

On January 13, 1940, Integrity Trust Company pledged the note and the collateral, together with all its other banking assets, except certain cash items, as security for a loan of some $20 million made to it by the Federal Deposit Insurance Corporation (R. 71a, 75a, 80a, 83a). The note in suit was endorsed and delivered to the Federal Deposit Insurance Corporation (R. 509a). Thereafter Integrity Trust Company closed and the Secretary of Banking became receiver in accordance with the Pennsylvania statutes. Integrity Trust Company was an insured bank under the Federal Deposit Insurance law (79a). It was closed under an arrangement by which all of its depositors, large and small, were paid in full (R. 81a). Authority for this transaction is contained in the Federal statutes (12 U. S. C., section 264(n)(4)). The arrangement was similar to that described in *Nichols* v. *National City Bank of Lynn*, 48 N. E. (2d) 49 (Mass., 1943), cert. den., 320 U. S. 742 and the one which this Court had occasion to examine in *D'Oench, Duhme & Co., Inc.*, v. *FDIC*, 315 U. S. 447, reh. den. 315 U. S. 830. See also *Lamberton* v. *Federal Deposit Insurance Corporation*, 141 F. (2d) 95 (C. C. A. 3, 1944), and *Brown* v. *N. Y. Life Ins. Co.*, 152 F. (2d) 246 (C. C. A. 9, 1945).

Promptly after January 15, 1940, various officers of the Federal Deposit Insurance Corporation communicated with

Alker concerning his loan.[2] He contended that there was an oral agreement between him and the Integrity Trust Company prohibiting the sale of the securities or the calling of the note. The Federal Deposit Insurance Corporation, however, made it clear to Alker from the very beginning that it did not consider itself bound by any such agreement, even if one had been made as he asserted, and he was requested to establish that such an agreement did in fact exist.

In November 1942 formal demand was made for the payment of the note, the demand was not met and the note thereafter remained unpaid. The securities constituting the collateral securing the note were sold after formal notice of sale to Alker, to the defendant DuBan, and to others who represented, or purported to represent, either Alker or Mrs. DuBan. The plaintiff bought in the collateral at the current market prices (R. 127a). The proceeds of the sale of the collateral were applied against the outstanding balances of principal and interest on the note and this suit was thereafter instituted to collect the balance remaining unpaid thereon. Petitioners seek to impugn the validity of the collateral sale by referring to it as a "so-called alleged private sale", by contending that it "was not advertised", that "no notice of it appeared on the bulletin board in the corridor of the Federal Deposit Insurance Corporation", and that "the alleged sale took place in a room on the second floor rear of the Corporation's building late in

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[2] Petitioners' brief, p. 14, says: "Mr. Teft, the chief supervisor of the Federal Insurance Corporation, wrote Mr. Alker requesting a conference to discuss his loan. The letter stated that it (Federal Deposit Insurance Corporation) understood there was an oral agreement concerning said loan and they wanted to discuss it." What the letter actually said was this (R. 552a): "You spoke of an agreement between you and the former President of the Integrity Trust Company with respect to your indebtedness. We should appreciate your furnishing us with a copy of such an agreement, as we have been unable to locate it in the files of the bank."

the afternoon, with no one present except two employees of the Corporation" (Petitioners' brief, p. 15). The record discloses, however, that Alker did receive at least six days' written notice of the day and hour of the sale; that he was invited to attend the sale but left the building immediately before it started; that the sale was conducted with all due formality; that stenographic minutes were taken; that the sale did not purport to be a public sale but a sale in precise accordance with the provisions of the note; and that such sale had marked advantages from Alker's point of view (R. 112a, 118a, 119a, 122a-136a, 143a, 144a, 320a, 526a). Indeed, the sale was postponed several times at Alker's request for a total of some 50 days from its original date (R. 480a). During that time he never asked that a public sale be held nor did he ever seek to enjoin it on the ground that it was improper. The trial court properly found that "the sale was within the powers given in the note and that it was legal and effective" (R. 480a).

The defense contended that an agreement existed between Alker and the Integrity Trust Company which, it was asserted, was binding upon the Federal Deposit Insurance Corporation, and which would have precluded either the Trust Company or the Federal Deposit Insurance Corporation, as its transferee, from selling the collateral as it did or from claiming a deficiency against Alker as demanded in the instant litigation.

Alker testified that the additional collateral was put up in September 1931, "provided they did not disturb the loan but carried the loan and did not disturb the collateral until he (DuBan) got his collateral back and the others who put up collateral got theirs back and I got my equity in the loan" (R. 187a). Fischer testified that Hardt agreed "he would not disturb the loan so long as the interest is met every month and the policies are kept up" (R. 249a). Hardt denied that he had said the bank would not call the loan or

sell the collateral (R. 256a) but said he did inform Alker and Fischer that "our attitude was one of complete co-operation" (R. 255a) and that "we would do everything reasonable within our power to make it possible for him to liquidate the loan ultimately at his convenience and at such a time as might cause him the least embarrassment" (R. 255a). Semisch, vice president and treasurer of the bank, testified that he did not recall the visit but denied that he had made any agreement concerning the calling of the loan or the selling of the collateral (R. 270a).

When the stock was pledged, Mr. DuBan gave Alker a power to pledge securities, witnessed by Fischer, which was in the customary form, authorizing the bank to use the stock as the absolute owner thereof (R. 521a). It contained no reference to the alleged agreement. No record of any sort was made of the alleged agreement (R. 273a, 281a); no memorandum was made of it (R. 259a); nothing to that effect was endorsed on the notes (R. 544a-547a). Neither the minutes of the directors nor of the executive committee referred to it (R. 328a-340a); the bank's books of account did not reflect it (R. 280a), and the bank examiners who examined the bank from time to time found no record of it (R. 278a, 280a, 295a, 298a, 307a). In discussing the loan with officers of the bank (R. 277a, 298a-300a), no reference was made to any such agreement. In their reports to their superiors, which were in turn submitted to the bank directors, the bank examiners made no mention of any such agreement, and they appraised the loan at a higher figure than they would have appraised it had they known of any "strings" attached to it (R. 289a-294a, 300a-301a). In all the correspondence between Alker and the bank concerning the loan, there is no reference whatever to the supposed agreement (R. 473a). All this, the Circuit Court of Appeals found to be a fact (R. 558).

The trial court held that the principal issue raised by the evidence was one of fact and posed the issue as follows (R. 478a): "Was there a complete enforceable agreement made on September 29, 1931 between the defendant Alker and the Integrity Trust Company by which the bank legally bound itself to refrain from demanding payment of the note or from liquidating the collateral in accordance with the terms of the instrument?" The court found that the evidence "is not sufficient to prove the existence of a legally enforceable contract which would in law or equity preclude the holder of a note, and its succesors in title, from exercising the rights expressly granted in the written instrument", and added: "Nor are we convinced that such an agreement was intended at the time" (R. 479a). The trial court further said: "Even if the language could be construed to mean that the bank bound itself not to exercise its rights under the terms of the note, the agreement lacks essential definiteness and certainty—certainty as to proof and certainty as to the time of performance, that is, the limit of the restraint" (R. 479a). The trial court concluded "that the sale was within the powers given in the note and that it was legal and effective" (R. 480a).

In affirming the judgment, the Circuit Court of Appeals assumed that the officers of the bank agreed that it "would not disturb the loan or the collateral until security values had risen to such a point that Alker could recover his 'equity'," and further assumed "that there was a valid oral contract to this effect and that Alker and DuBan did everything required of them by this contract" (R. 558). Pointing out, however, the absence of any record of any kind of the alleged agreement, the Circuit Court held that the facts in the case at bar resembled those in *D'Oench, Duhme & Co. Inc.* v. *FDIC*, 315 U. S. 447, reh. den., 315 U. S. 830, and concluded: "The contract which we have assumed existed in the precise terms contended for by the individual defendants is

a 'secret' agreement within the ruling of the Supreme Court in the D'Oench, Duhme case. * * * As such it is not enforceable against FDIC."

Argument

Neither the petition nor the brief in its support justifies the grant of a writ of certiorari in this case. The petitioners present no special or important reasons justifying review on certiorari. The decision of the Circuit Court of Appeals below represents no conflict among circuits, nor is there involved here an important question of federal law which has not been settled by this Court or which has been decided in conflict with any decision of this Court. Quite the contrary, the Circuit Court of Appeals applied, and correctly, the rule laid down in *D'Oench, Duhme & Co.* in which this Court settled the question which petitioners propose to raise.

The case at bar involves a not uncommon occurrence: an effort on the part of a debtor, in a suit brought by the Federal Deposit Insurance Corporation to recover a balance due upon a promissory note, to escape liability and defeat recovery by pleading an alleged "side" agreement with the bank, that in effect, the note is not what on its face it purports to be. Cf. *D'Oench, Duhme & Co. Inc.* v. *F. D. I. C.*, supra; *Deitrick* v. *Greaney*, 309 U. S. 190; *FDIC* v. *Pendleton*, 29 F. Supp. 779 (W. D. Ky., 1939); *FDIC* v. *Woods*, 34 F. Supp. 296 (W. D. Ky., 1940) cited in *D'Oench, Duhme & Co. Inc.* v. *F. D. I. C.*, 315 U. S. 447, at p. 462; *FDIC* v. *Vest*, 122 F. (2d) 765 (C. C. A. 6, 1941) cert. den., 314 U. S. 696. Here the debtor asserts, in substance, an alleged oral agreement that he was not to be held responsible on the note but that the bank was to carry the loan undisturbed until the collateral reached a value sufficient to enable it to pay the note in full and to return a portion of the security to him.

Assuming that a bank had the power to enter into such an engagement, the practical effect of which is to postpone payment of the note indefinitely, and perhaps forever, to give the bank a promissory note upon which there is no personal liability, to preclude the bank from disposing of the security —all in direct contradiction of the express provisions of the note—and, in effect to place it in the position of a "stock market" investor, it taxes credulity that the bank's officers did so bind the bank. Surely, the facts here disclose a case for estoppel in order that a well-defined federal policy be not defeated.

The trial court found as a fact that there was no oral agreement such as was contended for by the defendants in resisting the claim asserted by the plaintiff in its complaint. It was the task of the trial Judge to evaluate the testimony and to pass upon the relative credibility of the witnesses who testified with respect to the conversation out of which Alker contended the agreement arose. The trial court's conclusion, upon weighing the evidence, is patently not subject to review as it is purely and wholly a question of fact. What is more, the trial court concluded that even if an arrangement, such as Alker asserted, did exist, it was insufficient to preclude the plaintiff from selling the collateral or from enforcing the obligation to pay the balance due upon the note after crediting the proceeds of sale.

Since the Circuit Court of Appeals assumed, for the purposes of its decision, that the agreement which Alker urged did in fact exist, it did not reach the question of fact so decided by the trial Court. It held that, notwithstanding the existence of such an agreement, the plaintiff was entitled to recover since the agreement constituted no defense within the rule laid down in the *D'Oench, Duhme & Co.* case. Except for the fact that in the *D'Oench, Duhme & Co.* case the agreement was written, while in the case at bar it is contended that the agreement was oral, the

transactions are identical. Defendants' argument that the cases are different because the plaintiff in the instant case did not allege in its complaint that the agreement existed and that it was a fraud, while such allegations were contained in the reply in the *D'Oench, Duhme & Co.* case, is to no avail. In the *D'Oench, Duhme & Co.* case, the FDIC filed a reply to the defense, which was based upon an agreement in writing which actually did exist, and contended that it was not bound thereby. In the instant case, however, the Corporation took the position *that no such agreement existed;* consequently, it was not incumbent upon it to allege the same in its complaint and to seek avoidance thereof by claiming it to be a fraud or to file a reply addressed to the defense.[3] Accordingly, it had to be left to the defendant to plead that such an agreement did exist—which he did—and the court was thereupon called upon to determine whether the agreement in fact existed and whether, if existant, it constituted a sufficient defense to the action.

The other asserted distinctions between this case and the *D'Oench, Duhme & Co.* case (Petitioners' brief, p. 20-21) are patently trivial and immaterial.

Petitioners' argument addressed to the fact that the court below cited section 264(s) of 12 U. S. C. raises no substantial question. As was plainly pointed out in the *D'Oench, Duhme & Co.* case (as well as in *Deitrick* v. *Greaney,* 309 U. S. 190) the reach of the rule which prevents the maker of a note from avoiding liability by claiming an agreement such as is here contended "is not delimited to those instances where he has committed a statutory offense" (315 U. S. 458). On the contrary, the defense is not allowed in any case "where his act contravenes a general policy to protect the institution of banking from such secret

[3] Since the defendants' answers contained no counterclaim "denominated as such," a reply was not required (Rules of Civil Procedure, Rule 7).

agreements" (*ibid*). And as this Court further stated in that case, the principles are applicable "because of the federal policy evidenced in this Act (section 12B of the Federal Reserve Act, as amended, 12 U. S. C. section 264) to protect respondent (FDIC), a federal corporation, from misrepresentations made to induce or influence the action of respondent, including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans" (315 U. S. 459).

Nor is the fact that the court below found no fraud of any significance. Obviously since the trial court found that there was *no agreement,* such as was contended for by the defendants in attempting to defeat recovery, it could hardly have found fraud. The Circuit Court of Appeals, however, assuming that the agreement as pleaded by the defendants did exist, stated that it fell under the ban of the *D'Oench, Duhme & Co.* case. There is no inconsistency in these holdings; nor is there any basis for contending that the Circuit Court of Appeals found, as a fact, something which the trial Judge had failed to find.

Petitioners' reliance upon *Deitrick* v. *Standard Surety and Casualty Co.,* 303 U. S. 471, is misplaced. As was pointed out by this Court in *Deitrick* v. *Greaney,* supra, the *Standard Surety* case failed because on the pleadings there the receiver *relied upon the bank's rights alone,* and since the bank could not recover, because of the fraud of its officers, the receiver perforce failed to recover in the absence of a showing that creditors' rights were involved. In the case at bar, on the other hand, *the Corporation is not suing as receiver, nor is it relying upon the bank's rights alone;* it is suing as transferee for value, without notice, and, consequently, is entitled to recovery.

As to the Petitioners' effort to invoke state law, we need only refer to the Court's rulings in *Awotin* v. *Atlas Ex-*

change National Bank, 295 U. S. 209 and subsequent cases applying the principle there laid down. See also, *D'Oench, Duhme & Co., Inc.,* v. *F. D. I. C.* and *Deitrick* v. *Greaney,* supra.

In the present posture of the case it is sufficient merely to observe, without descanting, that the alleged oral agreement would, in any event constitute no defense to the plaintiff's claim on the note in view of the parol evidence rule, the note upon which suit is brought having been made in 1936 and the oral agreement alleged to have been made in 1931.

An examination of the record in this case and the opinions below make it abundantly plain that the issue presented here is narrow and of no general importance. The court below did not fail to follow applicable federal decisions; indeed, it did so; and the case turns upon its own peculiar facts.

Conclusion

We respectfully submit that the decision of the court below is correct, and that its decision involves no federal question of subtsance or general importance which remains unsettled by this Court. Petitioners have not demonstrated that the case warrants the allowance of a writ of certiorari; the petition for a writ should therefore be denied.

Respectfully submitted,

JAMES M. KANE,
Solicitor, Federal Deposit Insurance Corporation,
ALLEN S. OLMSTED, 2ND,
IRVING H. JUROW,
Attorneys for Respondent.

(12)

[illegible]

No. [illegible]

October Term, 1943.

[illegible]

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

[illegible]

A. B. Brown,
[illegible],
H. J. Allen, Jr.,
A. J. Levitt,
D. Boggis,
[illegible] A. Scott,
Attorneys for Petitioners.

[illegible]

Supreme

IN THE

Court of the United States.

OCTOBER TERM, 1945.

No. 880.

HARRY J. AI
VIDUALLY AN
A. DUBAN, KER, JR., AND MAMIE DUBAN, INDI-
D AS EXECUTRIX OF THE ESTATE OF ALFRED
DECEASED,

Petitioners,

v.

FEDERAL D POSIT INSURANCE CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT C URT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

The respondent in its brief asserts that there was no important question of Federal law involved in this case and that this case is ruled by *D'Oench, Duhme & Company v. F. D. I. C.*, 315 U. S. 447. It further states it is the usual case of a debtor trying to escape liability by pleading a side agreement. (Respondent's Brief, p. 9.) But that is just where the respondent errs. The respondent has endeavored to fit the facts of this case into the *D'Oench, Duhme* case and they just do not fit. Never has there been a case of this type before this Court. All the previous cases, including the *D'Oench, Duhme* case, have had some sort of fraud, misconduct or illegality involved in them. The Court's attention is called particularly to the fact that in the *D'Oench, Duhme* case, the F. D. I. C. (respondent) had no knowledge of the agreement (the written receipts stating the note would not be called for payment, 315 U. S., 447, 454) until after demand for payment of the note was made. But in the case

now before the Court the respondent knew the petitioners claimed there was a special agreement as early as February, 1940, because in its letter of February 29, 1940, the respondent requested a copy of the agreement (Record, p. 223a, 224a).

In the *D'Oench, Duhme* case the agreement was an express attempt to avoid liability on the note. In the case now before the Court, however, *the debtor has made no effort to avoid liability.* He has paid all the interest to the date of sale, made payments on account of the principal and paid approximately $5,000. a year to maintain insurance for the benefit of the Respondent, and paid over all the fees as received, which were fees both due by the Commonwealth and other substantial clients. *The oral agreement in the case at bar merely fixed the maturity of the note.* This was evidenced by the fact that the trust company in 1936 arranged for the issuance of new insurance policies which did not expire until 1946, *thereby in accordance with the oral agreement fixing the maturity of the obligation in 1946.* Furthermore, there is no fraud or illegality in the present agreement, nor is there anything secret about it. The Century Dictionary defines "secret" as "concealed," "hidden," and "kept from the knowledge of others." No such situation existed here, and this was therefore not a secret agreement.

The decisions of the trial court and the Circuit Court of Appeals in this case are the result of a gross misapplication of the *D'Oench, Duhme* case. The Chancellor said "the evidence does not prove the existence of the oral contract alleged by the note." Record, p. 480 (A). But prior to that he said: "It may be conceded that as a result of the conversation described there was a satisfactory understanding that the loan and the collateral would not be disturbed . . ." Just what are the differences between "satisfactory understanding" and a "valid agreement" are difficult to conceive. An understanding certainly infers there

is an agreement, and one that is designated to be "satisfactory" even more so.

The misapplication of the *D'Oench, Duhme* case is further evidenced by the statement of the Circuit Court of Appeals in its opinion that "We will assume further there was a valid oral contract to this effect, and that Alker and DuBan did everything that was required of them by this contract." Record, page 558. The Circuit Court not only assumed there was an oral contract in this case, but even assumed that it was a valid one. In spite of this assumption the Circuit Court then ruled the contract was invalid, because it came within the *D'Oench, Duhme* case, *which was a clear case of fraud, and an attempt to avoid liability by what was a secret agreement.*

Furthermore, the respondent accepted all the benefits of this oral agreement from 1940 to 1943, with full knowledge of the agreement and acquiescence therein. No demand for payment was made until November 1942. If the respondent did not wish to be bound by the agreement, it should have repudiated it in 1940, and not have accepted the benefits until 1943. This it did not do as will clearly appear by the record.

The Respondent in its brief says: "In the case at bar, on the other hand the corporation is not suing as receiver nor is it relying upon the bank's right alone. It is suing as transferee for value without notice and consequently is entitled to recover."

As was demonstrated in petitioner's original brief, (pp. 27-29), Respondent, under the controlling Pennsylvania law, was not a holder in due course for value without notice in view of the long lapse of time between the execution of the note in 1936 and its negotiation to the Respondent in 1940.

The Court's attention is again called to the fact that this is a suit in equity instituted by petitioners; that Respondent's brief is in error where it states that the Respondent informed Alker at the start that it would not

be bound by the oral agreement (Respondent's Brief, p. 5); that the record shows that the assigned fees constituted not only fees due by the Commonwealth of Pennsylvania but also large fees by private clients; that the record shows the president of the Integrity Trust Company did discuss the agreement with the Examiner; and that the record shows the Trust Company placed on the 1936 note a special notation referring to the prior existing notes as to which the agreement was made.

If the present decision of the Circuit Court of Appeals is permitted to stand, the conduct of a profitable banking business will, in these days when the world moves fast and the banking business must do likewise, be rendered almost impossible, because every action will have to be in writing and brought to the attention of the Examiner, and the difficult burden will be placed upon every customer of a banking institution insured by the F. D. I. C. to see that every transaction he has with the bank is properly recorded and brought to the attention of the bank examiner, although it is a matter over which he has no control, and a thing he could not humanly do.

Conclusion.

Wherefore, in view of the great confusion in these decisions and the gross misapplication of the *D'Oench, Duhme* case to the present one, it is submitted that there is an important federal question unsettled by this court and that the certiorari should be allowed.

Respectfully submitted,

A. D. Bruce,
E. Hall, II,
H. J. Alker, Jr.,
A. J. Levin,
D. Bortin,
A. Spiess,
Attorneys for Petitioners.

APR 22 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 880.

October Term, 1945.

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the ESTATE OF ALFRED A. DuBAN, Deceased,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

Petition for Rehearing.

EDWIN HALL, II,
A. D. BRUCE,
HARRY J. ALKER, JR.,
1505 Land Title Building,
Philadelphia, Pa.,
ALLEN J. LEVIN,
DAVID BORTIN,
STANLEY FOLZ,
Bankers Securities Building,
Philadelphia, Pa.,
L. A. SPIESS,
Washington, D. C.,
Counsel for Petitioners.

International, 236 Chestnut St., Phila. 6, Pa.

IN THE

Supreme Court of the United States.

October Term, 1945. No. 880.

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Harry J Alker, Jr., and Mamie DuBan, individually, and as Executrix of the will of Alfred A. DuBan, deceased, pray that this Court rehear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case.

On February 23, 1946, your petitioners filed with your Honorable Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit in the above matter.

The Respondent filed its brief with your Honorable Court on March 19, 1946.

Your petitioners filed their reply brief with your Honorable Court on Friday, March 29, 1946.

On Monday, April 1, 1946, your Honorable Court refused the certiorari.

The history of the case, the questions presented, the statutes and law involved, the specifications of errors and the reasons for granting the writ are all set forth in the petition for certiorari and brief in support thereof, to which reference is made and will not be repeated here.

Grounds for Granting the Petition.

1. Your petitioners feel that a serious error has been made by your Honorable Court in refusing the certiorari and submit that the United States Circuit Court of Appeals for the Third Circuit has decided an important federal question of substance in conflict with the applicable decisions of the Supreme Court of the United States, the Circuit Court basing its decision in the present case on the case of Federal Deposit Insurance Corporation v. D'Oench, Duhme Co., 315 U. S. 447, which your petitioners submit was never intended by your Honorable Court to apply to a case like the present one.

2. *In the D'Oench, Duhme case there was an attempt to avoid liability. In our case there is no attempt to avoid liability. There is no claim that under the agreement in this case Alker was not to be liable on the note at all. It was merely an agreement defining the time of payment of the demand note unless default in the terms of the agreement took place in the meantime.* No default has taken place to date in accordance with the terms of the agreement. The time for payment has not yet arrived, to wit; the date of the expiration of the insurance policies in the fall of 1946. None of the cases cited by Respondent are cases involving agreements deferring payment of the note, nor are they cases in which valuable consideration as here passed for the agreement. They are all cases where there was a definite effort to make assets of a bank appear of greater value than they actually were and thus deceive the bank examiner as to the true condition of the bank.

3. The basis of the D'Oench, Duhme case is a federal policy to protect Federal Deposit Insurance Corporation and the public funds which it administers against misrepresentation as to the securities or other assets in the portfolios of banks which Federal Deposit Insurance Corporation insures or to which it makes loans, 315 U. S. 447, 457. It is the "evil tendency" of the acts to contravene the policy governing banking transactions which lies at the root of the rule 315 U. S. 447, 459. The Court in so ruling relied on 7 Zollman, Banks & Banking (1936) SS 4783. That section deals with cases where the officers of a bank tried by a secret agreement to conceal or misrepresent the true condition of assets of the bank in order to obtain insurance of deposits from Federal Deposit Insurance Corporation.

But those are not the facts of this case. The identical assets with one exception were with the Integrity Trust Company, the insured state bank, at the time the Federal Deposit Insurance Corporation insured the said state bank, as were there when these assets were taken over by the Federal Deposit Insurance Corporation in 1940. The only change was that petitioner executed a new note in 1936 to replace the original two notes. The new note on its face clearly recited that it was "*in extension of and substitution for the previous notes,*" which notation all the bank witnesses testified was notice to everyone of a special agreement attached to the note. In fact, if anything, between 1936 and 1940 the condition of the assets had improved due to the increase in market value of the securities. There is no evidence in the record that the petitioner or the state bank officials made any misrepresentation of the securities pledged for this loan, their genuineness or integrity. The evidence further shows that in connection with the assignment of fees, some of which were due from the Commonwealth of Pennsylvania and some from individuals, all of the said fees as received were paid by the petitioner to the Trust Company and then to the Respondent, except one

which has not as yet been received. Therefore, *there was no evil tendency prevalent that might contravene the policy governing banking transactions.* Hence, to base the decision in this case on the D'Oench, Duhme case is a great misapplication of that principle of that case and will cause great injustice.

The misapplication of the D'Oench, Duhme case to this case is further evidenced by the statement of the Circuit Court of Appeals in its opinion that "We will assume further there was a valid oral contract to this effect, and that Alker and DuBan did everything that was required of them by this contract." Record, page 558. The Circuit Court not only assumed there was an oral contract in this case, but even assumed that it was a valid one. In spite of this assumption the Circuit Court then ruled the contract was invalid, because it came within the D'Oench, Duhme case, which was a clear case of fraud, and an attempt to avoid liability by what was a secret agreement. The Circuit Court of Appeals so ruled in spite of the express finding by the Chancellor that there was no fraud in this case. (Record Pp. 475a, 502a.)

4. In the present case there was no evidence of any request by Alker or DuBan that the transaction be not recorded among the records of the bank or knowledge on their part that same had not been recorded. The evidence shows to the contrary that there was such a record—both on the note itself and by action of the Executive Committee on several occasions.

5. The D'Oench, Duhme case furthermore was a case in which there was actual fraud and intent to deceive the Bank Examiner, whereas in our case there was a distinct finding by the District Court that there was no fraud, nor was there any deception or intention to deceive; the agreement having been openly made for the benefit of both the bank and the petitioners. In the D'Oench, Duhme case there was no way by which the Bank Examiner or the Fed-

eral Deposit Insurance Corporation could have learned the true facts.

In this case the president of the bank testified (record page 273a) that he himself discussed the matter with the Bank Examiner; the note in this case itself had specifically endorsed thereon a notation which indicated to all persons, including the Bank Examiner, that there was an agreement relating to the note, the Federal Deposit Insurance Corporation having recognized from the start that there was an agreement—they having checked up with Alker and Fischer, an important director and member of the Executive Committee of the Trust Company, as to the same, and, after checking up, continued to recognize it and conformed with its terms for over two years.

While in their brief (page 5) the Federal Deposit Insurance Corporation says it made clear to Alker that it did not recognize the agreement, Alker denies this and there is no evidence anywhere in the record that they advised Alker that they did not recognize it, but the record shows they did unconditionally recognize it and continued to accept the benefits conferred by the agreement for more than two years before it attempted to repudiate it. Furthermore, the record shows that the agreement was before the Executive Committee of the Trust Company a number of times, and by it was recognized as a binding and valid agreement.

6. The evidence shows that Mr. William P. Gest (who was president of one of the largest banking institutions in Philadelphia and a member of the Executive Committee of the Integrity Trust Company) stated at the Executive Committee meeting that inasmuch as they had made the agreement with Alker and Alker was living up to it, the Integrity must live up to its part. (Record pages 250a and 251a.)

7. If the decision here is allowed to stand, it will impose upon *every borrower from or customer of a bank* the

impossible duty of seeing that the records of the bank show his transaction with the bank. *A borrower or customer should not be penalized because of the failure of the institution's records, without his knowledge, to satisfactorily show his transaction with it, where the transaction is clean and above reproach.*

Here, however, not only was the present case clean and above reproach, but there was such a notation on the note itself that *even the bankers testifying as witnesses for the Respondent* admitted the special notation indicated that there was some agreement connected with the note, and the Bank Examiner and the Federal Deposit Insurance Corporation were both therefore on notice. Besides, the president of the institution testified he discussed it with the Bank Examiner.

8. In this proceeding the Federal Deposit Insurance Corporation elected to go into the equitable side of the Court. Your petitioners submit it should not be allowed to accept the benefits of the agreement for over two years, and then suddenly abandon such course and reverse its position when there was no default and retain both the benefits and the property belonging to others that was deposited on the strength of the agreement which it had recognized so long.

9. In the D'Oench, Duhme case the Federal Deposit Insurance Corporation did not know of any agreement existing until they made demand for payment. In this case the Respondent knew about the agreement existing before it took over the note. The Federal Deposit Insurance Corporation never stated that it was not bound by it, but on the contrary proceeded to carry on in the same manner for two years and more as had the Trust Company.

During all the period—about five years—that the Respondent insured the Trust Company, the Respondent had plenty of opportunity to inspect the assets and fully apprise itself of their condition.

Conclusion.

For the foregoing reasons it is urged that a rehearing be granted and the order denying the petitioners' petition for a writ of certiorari be reconsidered.

The undersigned, the counsel of record for the petitioners, certify that this petition for a rehearing is presented in good faith and not for the purposes of delay.

Respectfully submitted,

EDWIN HALL, II,
A. D. BRUCE,
HARRY J. ALKER, JR.,
1505 Land Title Bldg.,
Phila., Pa.
ALLEN J. LEVIN,
DAVID BORTIN,
STANLEY FOLZ,
Bankers Securities Bldg.,
Phila., Pa.
L. A. SPIESS,
Washington, D. C.,
Counsel for Petitioners.

(16)

IN THE

Supreme Court of the United States

No. 850.

October Term, 1945.

HARRY J. ALKER, JR., and MARIE DuBAN, Individually, and as Executrix of the ESTATE OF ALFRED A. DuBAN, Deceased,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

PETITION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING.

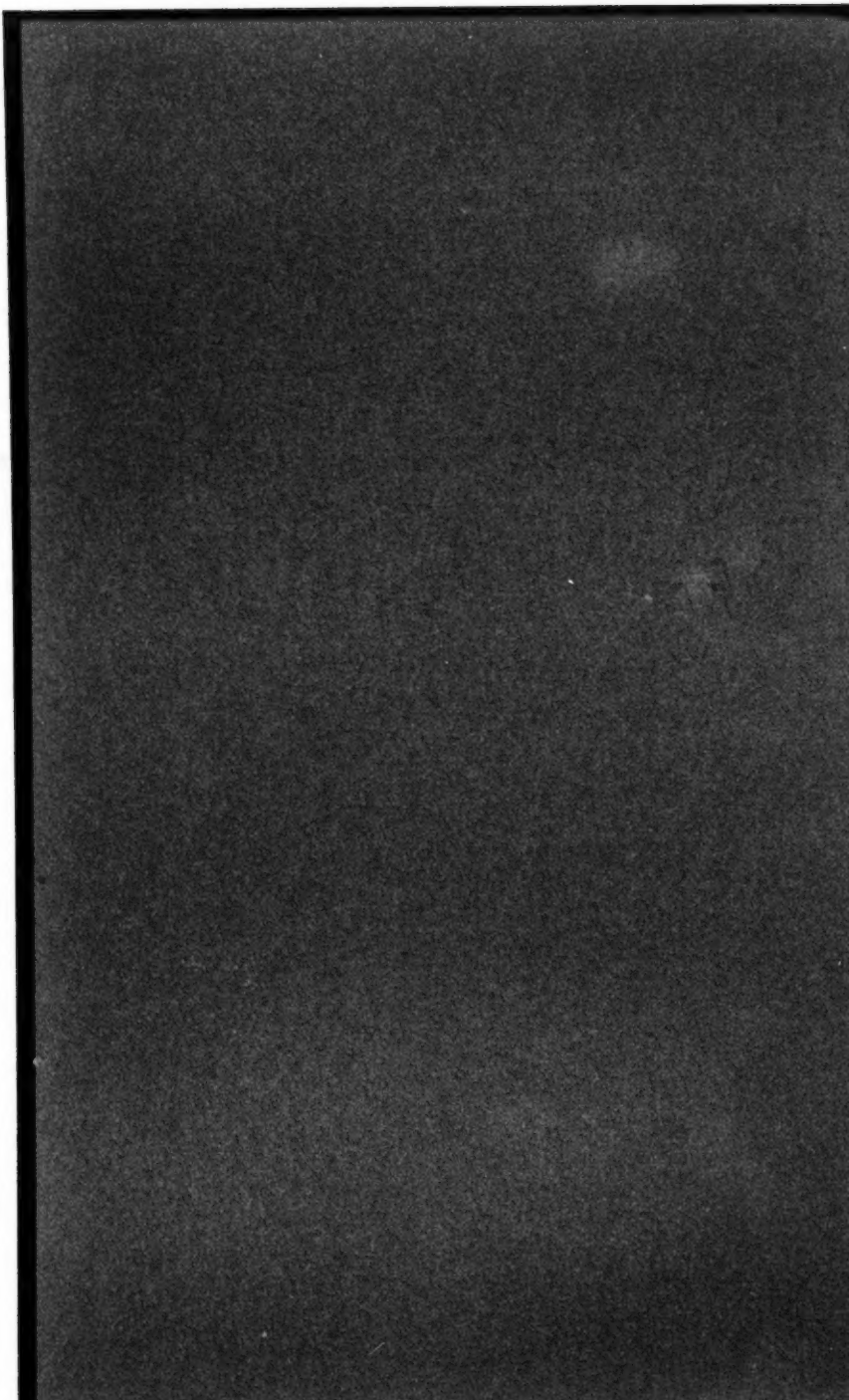
EDWIN HALL, II,
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IN THE

Supreme Court of the United States.

No. 880.

October Term, 1945.

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

PETITION FOR LEAVE TO FILE SECOND PETITION FOR RE-HEARING.

To the Honorable the Acting Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, HARRY J. ALKER, JR., and MAMIE DUBAN, individually and as Executrix of the will of Alfred A. DuBan, deceased, pray leave to file a second petition for rehearing and reconsideration of petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case.

The first petition for re-hearing was filed on Monday, April 22, 1946, the day of Chief Justice Stone's sudden unfortunate death. It was refused on the following Monday, April 29, 1946.

Your petitioners submit that the week of April 22nd was a very distressing week to your Honorable Court and one in which your Honorable Court could not be other than very much upset.

The matter here is one involving a federal policy. There has been a gross misapplication to this present case of the decision of your Honorable Court in the case of *Federal Deposit Insurance Corporation v. D'Oench, Duhme & Co.*, 315 U. S. 447; grave inequity has been done; your petitioners will suffer irreparable damage; and great confusion will result generally if the decision is allowed to stand.

Your petitioners therefore have prepared a second petition for re-hearing of their petition for certiorari and beg leave to file the same.

Respectfully submitted,

Edwin Hall, II,
A. D. Bruce,
Harry J. Alker, Jr.,
1505 Land Title Bldg.,
Phila., Pa.
Allen J. Levin,
David Bortin,
Stanley Folz,
Bankers Securities Bldg.,
Phila., Pa.
L. A. Spiess,
Washington, D. C.,
Conusel for Petitioners.

ORDER.

AND NOW, , 1946, leave is granted the petitioners to file a second petition for re-hearing of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case.

BY THE COURT,

.....

J.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 880.

October Term, 1945.

Harry J. Alker, Jr., and Mamie DuBan, Individually, and as Executrix of the Estate of Alfred A. DuBan, Deceased,

v.

Federal Deposit Insurance Corporation.

SECOND PETITION FOR RE-HEARING.

To the Honorable the Acting Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the will of Alfred A. DuBan, deceased, again pray that this Court re-hear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above matter.

Your petitioners filed with your Honorable Court on April 22, 1946—the day of Chief Justice Stone's sudden death—their petition that your Honorable Court reconsider its action in refusing your petitioners a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above matter.

The said petition for re-hearing was refused on April 29, 1946.

At the time of the presentation of the said petition there was not a full court—Mr. Justice Jackson being absent in Europe and Chief Justice Stone having been suddenly taken ill and dying subsequently.

The week of April 22, 1946, was a week of calamity and grief to this Honorable Court. Because of the same and the possible effect it had on the remaining members of the Court, your petitioners feel that they should request a rehearing.

The matter is one of public policy and great public interest because the question here is not only one that affects your petitioners seriously but also practicallly all the banks and banking institutions of the United States—they being insured by the Federal Deposit Insurance Corporation—and the public doing business therewith.

The refusal of the certiorari in this case leaves the banking world in doubt as to just how far this Honorable Court intended its important decision in *Federal Deposit Insurance Corporation v. D'Oench, Duhme & Co.*, 315 U. S. —447, to apply, that being the case relied upon by the Circuit Court as the basis for its decision in the present case. For this reason your petitioners submit the matter should only be disposed of after oral argument and action by the full court.

In the said case of *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, your Honorable Court on page 457 ruled that there was a federal policy to protect the Federal Deposit Insurance Corporation and the public funds which it administers against misrepresentations and the securities and other assets in the portfolios of the banks which the Federal Deposit Insurance Corporation insured or to which it makes loans; and on page 459 ruled that "there was a federal policy to protect the Federal Deposit Insurance Corporation from misrepresentations made to induce or influence the action of the Federal Deposit Insurance Corporation including mis-statements as to the genuineness or integrity of securities in the portfolios of banks which it insured or to which it makes loans." Having found that there was such a federal policy it proceeded to decide the *D'Oench, Duhme* case.

The Circuit Court of Appeals for the Third Circuit based the decision in the present case on the Court's finding

in the aforesaid *D'Oench, Duhme* case, thus *deciding that there was a federal policy present in this case and one over which the Supreme Court would have jurisdiction.*

In our case, however, petitioners contend the Circuit Court of Appeals for the Third Circuit misinterpreted and misapplied the decision in the *D'Oench, Duhme* case, causing confusion aforesaid as to just what the Supreme Court meant by the *D'Oench, Duhme* decision.

In the present case there was no misrepresentation as to the securities or other assets in the portfolios of the trust company. Furthermore, there was no mis-statement as to the genuineness or integrity of securities in the portfolios of the trust company. The identical securities were on deposit as collateral for this loan at the time the Federal Deposit Insurance Corporation took over the assets as were on deposit when the agreement was made with the trust company, except Alker had signed a new note and the trust company had arranged for new insurance policies which did not expire until 1946. All of these assets had been examined by the Bank Examiner many times since 1931. The stocks and bonds with the loan were marketable securities (mostly in national corporations which had large deposits with the trust company and with whose intrinsic worth both the trust company and the Federal Deposit Insurance Corporation were familiar) the assignment of fees was good and binding on the assignor, large sums were collected thereon, the policies of insurance expiring in the latter part of 1946 were properly assigned and maintained in force, and the interest was paid. The note itself had an endorsement thereon which was notice of the agreement. *The agreement operated to the very substantial advantage of the trust company. There was nothing of an evil tendency therefore in this case that could possibly contravene the federal policy referred to by the Court in the O'Oench, Duhme case.*

The Circuit Court of Appeals for the Third Circuit decided this case in favor of the Federal Deposit Insurance

Corporation because it was of the opinion that the agreement in question was a "secret" agreement. The District Court found, however, there was no fraud and did not find there was any secret agreement. Instead of showing a secret agreement the record shows that the agreement in question was discussed by the president of the trust company with the Bank Examiner; that the instrument itself had a notation on it that was notice to the Bank Examiner and the Federal Deposit Insurance Corporation that there was an agreement; that the Federal Deposit Insurance Corporation clearly knew of the agreement when it took over the note and collateral; that for over two years thereafter it accepted the benefits of the agreement with full knowledge of the agreement and then suddenly attempted to repudiate it. The record clearly shows that the agreement was known to the president, the vice-president, the Executive Board of the trust company, the Federal Deposit Insurance Corporation and the Bank Examiner, and that even the clerks in the loan department knew there was an agreement in connection with the loan, all as stated in the petition for certiorari and the first petition for re-hearing, to which reference is made; the averments therein set forth being made a part hereof by reference and will not be repeated here.

The Circuit Court of Appeals for the Third Circuit based its decision entirely on the *D'Oench, Duhme* case which was a case in which the bank and the maker of the note conspired to deceive the Bank Examiner, and the Federal Deposit Insurance Corporation knew nothing about the agreement until it brought suit on the note itself. *It was a case in which there was a clear mis-statement as to the genuineness of the security and a clear intention to deceive.*

No such situation exists here. In the present case the Federal Deposit Insurance Corporation was familiar with the agreement at the time it took the assets over; made no demand for payment for over two years, and during that

period billed Alker and accepted interest at 5% and the benefit of the insurance—all the interest and premiums having been paid up to the date of the alleged sale. In fact, the interest has been tendered by Alker regularly to the Federal Deposit Insurance Corporation to date, and all annual insurance premiums (which run into substantial sums) paid by Alker to date on the $125,000. insurance on the life of Alker payable to the Federal Deposit Insurance Corporation and held by the Federal Deposit Insurance Corporation as collateral with the loan. The Respondent at the trial admitted there was no default in any of these items.

Your petitioners submit your Honorable Court in deciding the D'Oench, Duhme case never intended it to apply to a case like the present one, and this decision should not be allowed to stand. If it is, it will place the burden upon every customer of a banking institution making any agreement therewith, however beneficial to may be to the banking institution, to see that the bank itself (*over which the customer has no control*) makes such a record on its own books that will clearly bring the same to the attention of the Bank Examiner and the Federal Deposit Insurance Corporation. This is impossible in practice as the customer has no access to or control over the records of the bank, and it will greatly impede the banking business and cause great confusion in the banking world if each customer is obliged, in order to protect himself, to communicate directly with the Department of Bank Examiners and the Federal Deposit Insurance Corporation about his transaction.

Surely your Honorable Court had no such intention in mind when it decided the D'Oench, Duhme case, but on the contrary it only intended the same should apply to a case of misrepresentation, fraud or deceit, which does not exist in the present case.

A very important difference between this case and the D'Oench, Duhme case is this: It was the intention in the

D'Oench, Duhme case to evade liability on the note. Here there was no such intention. The agreement in this case was only made to define the maturity of the note; not to avoid or evade any liability on the note. Petitioner Alker here admits liability but that under the agreement the indebtedness does not mature until the end of the ten-year term insurance policy in 1946.

The Federal Deposit Insurance Corporation here has appealed to the equitable side of the Court as it not only seeks a deficiency against Alker arising out of the alleged sale of the securities to itself, but asks an order compelling one of the corporations to transfer to it some of the securities alleged to have been sold. Surely this is no case for equitable relief to the Federal Deposit Insurance Corporation. The collateral was collateral for an obligation which was accompanied by the agreement in question, which agreement they elected to respect for more than two years after they took over the assets, including Alker's note and collateral, and from which time there could be no question as to their knowledge of the agreement. During that time they billed and received interest monthly at the rate of five per cent per annum. They held the $125,000. insurance policies on the life of Alker in their favor and regularly checked to see if the premiums (amounting to between $4,000. and $5,000. per annum) had been paid. Any equities here should be with the petitioners who acted in the best of faith and scrupulously lived up to their agreement.

Petitioners submit that here there has been a misapplication to this case by the Circuit Court of Appeals for the Third Circuit of the *D'Oench, Duhme* decision; that there is a matter of federal policy involved here; and, if the present decision of the Circuit Court of Appeals for the Third Circuit is permitted to stand, irreparable damage will result to your petitioners; gross inequity will be done to your petitioners in an equity proceeding; and great confusion will exist as to the effect of the *D'Oench, Duhme* decision.

Because thereof your petitioners with all earnestness beg the matter be reconsidered by a full court and that a re-hearing be granted.

The undersigned, the counsel of record for the petitioners, certify that this petition for a re-hearing is presented in good faith and not for the purposes of delay.

Respectfully submitted,

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